

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 376  
5383686

BETWEEN ALAN JOHN REID, LABOUR  
INSPECTOR  
Applicant

A N D GUY ROBINSON and TANYA  
BRADFORD-ROBINSON t/a  
KOPU ROADHOUSE BAR N  
CAFE  
Respondents

Member of Authority: K J Anderson

Representatives: Alan Reid, Labour Inspector (Applicant )  
Tanya Bradford-Robinson, Advocate for Respondents

Investigation Meeting: On consideration of the papers

Date of Determination: 17 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**The matter for determination**

[1] The Labour Inspector claims that the respondents have failed to pay the complainant, Ms Maia Randall, annual holiday pay of the gross amount of \$428.48. Following several requests for payment; on 30 May 2011, pursuant to s.224 of the Employment Relations Act 2000 (the Act), the Labour Inspector issued a demand notice for the above sum. The respondents have not formally objected to the demand notice, albeit there is evidence of further discussions between the Labour Inspector and Mr Guy Robinson up until 14 May 2012.

[2] The Labour Inspector now seeks a compliance order pursuant to s.137 of the Act, ordering that the sum of \$428.48 be paid to him for the use of the complainant. The Labour Inspector also asks that the Authority gives consideration to awarding a

penalty against the respondents for failing to produce the employee's wage and time records as requested. However, following a conference call with the parties on 30 July 2012, wage and time records have now been produced by the respondents and I conclude it is not appropriate to consider the matter of a penalty pertaining to this issue any further.

### **Background**

[3] Ms Maia Randall began working at the Kopu Roadhouse Bar N Café (the Café) while still attending Thames High School (the School). The working arrangement was as a result of a Gateway programme operated by the School. The objective of the programme is to allow students to gain practical work experience with local businesses in order to promote a smooth transition from school to work; but pursuant to s.71(4) of the Education Act 1989, the student is not entitled to be paid for the hours that are worked during the normally recognised school hours.

[4] The *Work Learning Agreement* signed by Ms Randall, her mother, an officer of the School, and Ms Tanya Bradford-Robinson, records that the *Proposed Duration in Workplace* would be from 4 March 2010 to 2 July 2010. However, it seems that this was brought forward and Ms Randall became contracted to gain work experience at the Café from on or about 4 October 2009 to 2 July 2010.

[5] The wage and time records eventually provided by the respondent show that Ms Randall was paid \$10 per hour while she was engaged under the Gateway programme; albeit there was no entitlement to payment under s.71(4) of the Education Act 1989. For the period week ending 4/10/09 to week ending 27/12/09, while engaged via the Gateway programme, Ms Randall earned \$1,295. The information received from the respondents is that while there was no obligation to do so under the Gateway programme, they paid Ms Randall \$10 per hour as a "gratuity" to cover her transport and clothing expenses. While the respondents appear to have included the so-called gratuity payments in the Inland Revenue reconciliation records, in equitable terms, Ms Randall had no holiday pay entitlement while employed via the Gateway programme.

[6] The wage and time records show that Ms Randall was also employed at the Café during the summer school holidays and was paid at the rate of \$12.50 per hour

from the week ending 10/01/10 to the week ending 31/01/10; earning the gross sum of \$581.25.

[7] From the week ending 7/02/10 to 27/06/10, Ms Randall was engaged again on the Gateway programme, earning a total of \$1,730, but this sum does not attract holiday pay.

[8] It appears that Ms Randall left school on or about 27 July 2010 and was then engaged at the Café as an employee with full rights as such, including the entitlement to holiday pay. Ms Randall ceased her employment on or about 22 October 2010 having earned the gross sum of \$3,199.15 as an employee.

[9] Therefore the total earnings for which Ms Randall has a holiday pay entitlement is \$3,780.40.

### **Analysis and conclusions**

[10] It is obvious to me that because the respondents did not provide the wage and time records as requested by the Labour Inspector (on several occasions), he was left in a situation that he could only calculate the holiday pay due to Ms Randall based on her version of events and the Inland Revenue records. Hence a demand notice was duly issued for the sum of \$428.48. However, the calculation of this amount appears to be based on the inclusion of the “gratuity” monies paid when Ms Randall was engaged under the Gateway programme as these amounts appear to have been included in the Inland Revenue reconciliations filed by the respondents.

[11] However, now that the wage and time records have been provided, based on these, the gross income of Ms Randall, while engaged as an employee, appears to be \$3,780.40; rather than the \$5,356 as calculated by the Labour Inspector based on Inland Revenue records. Nonetheless, given that the wage and time records did not clearly show that the \$10 per hour was a gratuity, to which Ms Randall really had no legal entitlement, and given that she was working some hours outside the normal school hours to accommodate the operation of the Café<sup>1</sup> under the Gateway programme, the basis of the Labour Inspector’s calculations is quite understandable.

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<sup>1</sup> Including the opening time, as dictated by licensing laws.

[12] However, it seems to me that the equity and good conscience jurisdiction of the Authority under section 157(3) should be applied to the circumstances of this matter. Therefore, based on the evidence available to the Authority, it seems that the gross earnings of Ms Randall, when she was an employee, amounted to the gross sum of \$3,780, hence she is entitled to annual holiday pay calculated at 8% of this amount; being \$302.43.

### **Determination**

[13] For the reasons set out above, Guy Robinson and Tanya Bradford-Robinson, trading as Kopu Roadhouse Bar N Café, are ordered to pay to the Labour Inspector, for the use of Ms Maia Randall, annual holiday pay of the gross sum of \$302.43. The Labour Inspector is entitled to the sum of \$71.56, being the application fee paid to the Authority. The respondents are also ordered to pay this sum to the Labour Inspector; making a total sum of \$373.99 to be paid not later than 28 days of the date of this determination.

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