

- Section 46, and s 49 to 56, and s 61(3) of the HA, being entitlement to and payment for public holidays
- Section 81 of the HA, being holiday and leave records
- Ms Abdallah is owed holiday pay, normal pay, overtime and/or time for working public holidays.
- A penalty should be imposed against Akina for breaches of the HA

Background

[4] Akina operates a retail fragrance and make-up business, primarily via a website and 'Pop-Up' stores, at which Pop-Up Sales Events take place. Mr Damien Green, Director, stated that the pop-up events are usually staffed by two permanent employees with approximately 8 temporary employees.

[5] Permanent employees operate on a 3 week on one week off cycle with one or two days off between events.

[6] Ms Abdallah commenced employment with Akina in May 2017, initially on a temporary and casual basis as a shop assistant. During that period she was paid on a 'pay as you earn' basis at holiday accruing at 8% in accordance with s 23 of the HA.

[7] In June 2017 Ms Abdallah applied for a vacancy as an Assistant Store Manager and commenced full-time employment as an Assistant Retail Manager on 13 June 2017. Her employment with Akina ended on 24 January 2018.

Terms of employment

[8] Ms Abdallah was provided with an individual employment agreement which was not signed by the parties (the Employment Agreement), but Ms Abdallah does not dispute that she received it.

[9] The Employment Agreement provided the following:

6 Hours of Work

6.1 Full Time Hours with an obligation to perform overtime as necessary but without extra payment

The Employee's normal hours of work shall be three weeks on and one week off, during on weeks the employee is required to be available for work

between Mondays to Sunday, however, the event schedule will dictate actual days of work and actual days off. Days off will be deducted from accrued rest/holiday days as outlined in clause 8.1. The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

7 Wages/Salary/Allowances

The Employee's salary shall be **\$40000** per annum, which shall be paid **weekly on Wednesday into a bank account nominated by the employee.**

8 Holidays and Leave Entitlements

8.1 Annual Leave and Rest Days

The Employee shall be entitled to be paid annual leave of five weeks per year in accordance with the Holidays Act.

The employee shall be entitled to 2 rest days for every week worked. This totals 104 rest days in a calendar year.

Combining rest days and annual leave, this entitles the employee to 129 rest days and annual leave days combined. These accumulate on a pro-rata basis for every day or part day worked.

Every day that the employee is not working will be deducted from this balance.

The Employee shall be entitled to be paid annual leave of five weeks per year in accordance with the Holidays Act.

The employee shall be entitled to 2 rest days for every week worked. This totals 104 rest days in a calendar year.

Combining rest days and annual leave, this entitles the employee to 129 rest days and annual leave days combined. These will accumulate on a pro-rate basis for every day or part day worked.

Every day that the employee is not working will be deducted from this balance.

At the employers' discretion holiday/rest days may be taken in advance. If the employee leaves their employment before becoming entitled to enough annual holidays to cover the amount of annual holidays they took in advance:
- the employer may recover the amount paid to the employee for holidays taken in advance that is not covered by the employees annual holiday entitlement.

This clause is subject to the Wages Protection Act 1983. The Employee's signature will satisfy the written consent requirement of the Wages Protection Act 1983.

[10] The Employment Agreement entitled Ms Abdallah to 5 weeks annual leave in accordance with the HA, and to 2 rest days for each week worked.

[11] In a 52 week period Ms Abdallah would be required to work 39 weeks, and entitled to 104 rest days (calculated as 2 days per week worked: $52 \times 2 \text{ days} = 104 \text{ days}$) plus 25 days annual leave. This is a total annual entitlement of 129 days.

Has Akina breached s 16 and s 21 to s 28 of the HA?

[12] Section 16 of the HA applies to employees who have completed 12 months continuous employment. Ms Abdallah had not completed 12 months continuous service at the termination of her employment on 24 January 2017. Employees who have not completed 12 months continuous employment are covered by s 23 of the HA which mandates that the employer must pay the employees holiday pay at the rate of 8% of the employee's gross earnings.

[13] During the period from May to 13 June 2017 when Ms Abdallah worked on a casual basis she had been paid holiday pay in accordance with s 28 of the HA.

[14] During the period when Ms Abdallah was employed as a permanent employee in the Assistant Store Manager role she was contractually entitled to 2 rest days for each week worked. In addition Ms Abdallah was entitled to 25 days annual leave in accordance with clause 8.1 of the Employment Agreement.

[15] During the period 13 June 2017 to 24 January 2018 there were 32 weeks worked which entitled Ms Abdallah to 64 rest days. I am satisfied from the documentation, in particular the wage and time records, filed by the Respondent that Ms Abdallah had her full entitlement to rest days.

[16] Ms Abdallah was also entitled to 15.4 annual leave days for that period (calculated as a pro-rata of 25 days for the 32 weeks worked). This equates to a total entitlement of rest and annual leave days during that period of 79.4 days.

[17] The wage and time records show that during the period 13 June 2017 to 24 January 2018 Ms Abdallah took a combination of 84 days rest and annual leave days. Ms Abdallah had taken her full entitlement of rest days, being 64, and therefore had taken the additional 20 days as annual leave days.

[18] I find that Ms Abdallah had exceeded her annual leave entitlement by 4.6 days.

[19] Her annual salary during that 32 week period equates to \$24,615.38. Holiday pay entitlement in accordance with the statutory entitlement and the contractual entitlement is 10% of that salary, or \$2,461.54.

[20] Akina had paid Ms Abdallah the sum of \$3,333.13 in respect of the annual leave entitlement, which sum is in excess of her statutory and contractual entitlement in the amount of \$871.59.

[21] I find that at the time her employment with Akina ended, Ms Abdallah was not entitled to annual leave entitlement and had in fact exceeded her annual leave entitlement.

[22] **I determine that Akina has not breached s 16 or s 21 to s 28 of the HA.**

Has Akina breached s 46, and s49 to 56, and s 61(3) of the HA?

[23] Sections 46, 46 to 56, and s 61(3) of the HA are concerned with public holidays.

[24] In accordance with the HA an employee is entitled to be (i) paid time and a half for being required to work on a public holiday and (ii) to an alternative day off, provided that day would otherwise be a normal work day for the employee. Section 61(3) of the HA is concerned with the exchange of an alternative day for payment if the employee has been employed for 12 months since the entitlement to an alternative day arose.

[25] During the period 13 June 2017 until 24 January 2018 there were 5 public holidays: Monday 23 October 2017, Monday and Tuesday 25 and 26 December 2017 and Monday and Tuesday 1 and 2 January 2018.

[26] According to the documentation submitted by the Respondent Ms Abdallah did not work any of the public holidays which arose during the period of her permanent employment. Moreover I observe that the public holidays which did arise did not do so on a day which would otherwise have been a working day for her.

[27] **I determine that Akina has not breached s 46, and s49 to 56, and s 61(3) of the HA.**

Has Akina breached s 81 of the HRA?

[28] Section 81 of the HA mandates that an employer must keep a holiday and leave record including a detailing of a full analysis of hours worked, dates and payments for annual, statutory and public holidays.

[29] In accordance with s 81(3) of the HA the holidays and leave record must be kept in a written form or s 81(3)(b):

In a form or in a manner that allows the information in the record to be easily accessed and converted into written form

[30] Akina recorded rest days taken as ‘additional leave day’ in its payroll system and in Ms Abdallah’s payslips which were provided to her.

[31] The payroll administrator also kept a record of rest days and annual leave days taken that was available to Ms Abdallah on request.

[32] Copies of these documents were provided to the Authority together with the roster spreadsheet and copies of the email containing the weekly roster details which was sent to Ms Abdallah.

[33] I observe that Ms Abdallah was provided with full details of her pay and leave taken and entitlements by Akina. However there has not been full compliance in respect of the statutory requirements set out in s 81 of the HA.

[34] **I determine that Akina has breached of s 81 of the HA.**

Is Ms Abdallah is owed holiday pay, normal pay, overtime and/or time for working public holidays?

[35] Having determined that the only respect in which Akina breached the HA related to s 81 and its record keeping, I find that Ms Abdallah is not owed any monies by Akina.

Should a penalty be imposed against Akina for breaches of the HA?

[36] I have found a minor breach of s 81 of the HA in respect of the holiday and leave record kept by Akina.

[37] However I have found that this breach was not deliberate and resulted in no disadvantage to Ms Abdallah who was supplied with all relevant documentation pertaining to her holiday and leave use and entitlement.

[38] Having considered the principles which should govern the imposition of a penalty¹, I determine that a penalty of \$100.00 is appropriate.

[39] **I order that Akina is to pay a penalty of \$100.00 to the MBIE Trust Account. Payment is to be made within 28 days of the date of this Determination.**

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

Costs

[40] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[41] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority