

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 5
3036451

BETWEEN ANGELA BENNETT
Applicant

A N D JANE CAMPBELL T/A WAIRAU
COVERS
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
No appearance for respondent

Investigation Meeting: 6 December 2018 by telephone

Date of Determination: 8 January 2019

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] Ms Bennett claims that she is owed final holiday pay and that she was incorrectly paid rolled up holiday pay under s 28 of the Holidays Act 2003. She also claims that she was not paid for public holidays and that she was underpaid by reference to the Minimum Wage Act 1983.

Respondent's failure to engage

[2] The respondent has failed to lodge a statement in reply, and has failed to engage in any meaningful way with the Authority. The following is a timeline of contacts and attempted contacts with the respondent:

- (a) On 20 August 2018 the Authority sent a copy of the statement of problem to Ms Campbell by courier, along with a blank statement of reply form and guidance notes, in the usual way. This was signed for as received on 22 August 2018.
- (b) On 7 September 2018 an Authority Officer spoke to Ms Campbell and explained how to apply for leave to lodge the statement in reply out of time. He also communicated with her by email reiterating the importance of engaging with the Authority.
- (c) On 13 September 2018, the Authority Officer sent another email to Ms Campbell to say that the matter was to be passed to a Member.
- (d) On 4 October 2018, the Authority Officer wrote to the parties to say that a case management conference call would be held on 12 October 2018.
- (e) On 12 October, an attempt was made to join Ms Campbell to the call but she did not answer. The telephone conference proceeded without her participation.
- (f) On 15 October a notice of direction was sent to both parties summarising the call. This explained the need for Ms Campbell to take part in the process and warned her of the possibility that orders may be made against her whether she participated or not.
- (g) On 15 October I also sent out a member's minute which sought clarification about aspects of Ms Bennett's claim. I invited Ms Bennett to confirm whether my understanding was correct and gave Ms Campbell an opportunity to comment, and to lodge a statement in reply, together with time and wage, and holiday and leave records.
- (h) On 23 October Ms Bennett amended her statement of problem to add in a claim of breach of the Minimum Wage Act and to increase the number of days of holiday pay sought. This document was emailed to Ms Campbell on 23 October.

- (i) On 21 November the parties were informed that an investigation meeting by telephone would take place on 6 December. The respondent was advised by email that, as she had failed to engage thus far, she would only be contacted on 6 December if she confirmed beforehand that she would be taking part and provided a contact telephone number. The notice of investigation meeting also stated that the parties had to provide a contact telephone number for the meeting.

[3] At no point did Ms Campbell respond to any of these communications, or provide any information to assist the Authority. Accordingly, the telephone investigation meeting on 6 December proceeded without her participation.

Discussion and findings

Rolled up holiday pay

[4] First, I find that Ms Bennett was incorrectly paid rolled up holiday pay. Section 28 of the Holidays Act provides as follows:

28 When annual holiday pay may be paid with employee's pay

(1) Despite section 27, an employer may regularly pay annual holiday pay with the employee's pay if—

(a) the employee—

- (i) is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work for less than 12 months; or
- (ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16; and

(b) the employee agrees in his or her employment agreement; and

(c) the annual holiday pay is paid as an identifiable component of the employee's pay; and

(d) the annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.

(2) If an employee to whom subsection (1)(a)(i) applies is employed by the same employer beyond 12 months on a series of fixed-term agreements of less than 12 months each, the employer and employee

may agree that the employee is to be paid in accordance with subsection (1) regardless of the number of agreements.

(3) If the fixed-term agreement of an employee to whom subsection (1)(a)(i) applies is followed by permanent employment with the same employer, the employee—

(a) becomes entitled to paid annual holidays at the end of 12 months' continuous employment (including the period of that fixed-term agreement) under section 16; but

(b) the amount of the holiday pay that the employee is entitled to be paid for the holidays is reduced by the amount that the employee has already received under subsection (1).

(4) If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[5] Ms Bennett was not employed on a fixed term contract, and her hours were not so intermittent or irregular that it would have been impracticable for the respondent to have provided her with 4 weeks' annual holidays under s 16 of the Holidays Act. Indeed, the record of weekly hours provided by Ms Bennett shows that she worked almost every week, usually between 20 and 25 hours each week.

[6] However, the timesheets also show that Ms Bennett was paid separately for holidays she actually took. Therefore, her claim relates only to final holiday pay, and not also annual holidays taken.

Final holiday pay

[7] Ms Bennett supplied to the Authority copies of hand written timesheets with pay calculations on them, together with a spreadsheet which had been created by an accountant friend of hers. The spreadsheet was more comprehensive than the timesheets, of which several were missing. I understand that the spreadsheet had been created by reference to the timesheets and bank information. As it gives a more complete picture, and shows holidays taken which the timesheets do not, I rely upon that document principally, although I have also consulted the timesheets where the spreadsheet appeared to have anomalies.

[8] Ms Bennett says she was never provided with a written employment agreement.

[9] From the documents that she supplied it appears that Ms Bennett commenced employment with the respondent on 1 April 2014. She therefore had accrued rights to 4 weeks' paid holiday each year from 1 April 2015. Ms Bennett appears to have ceased working for the respondent at some date in the last week of March 2018. For simplicity's sake I shall assume it was on 31 March 2018. Therefore, Ms Bennett had accrued a right to 80 days' holiday pay as at 31 March 2018.

[10] The documents provided by Ms Bennett suggest that she took:

- (a) no annual leave that was paid between 1 April 2014 and 31 March 2015;
- (b) 10 days' paid annual holiday between 1 April 2015 and March 2016;
- (c) 21 days' paid annual holiday between 1 April 2016 and 31 March 2017; and
- (d) 13 days' paid annual holiday between 1 April 2018 and 31 March 2018.

[11] Ms Bennett was paid for each day of annual leave she took, but appeared to have received no final holiday pay for the 36 days of holiday pay she accrued but did not take. She is entitled to be paid for those days. I note that this is a lower figure to that which I originally indicated in my minute of 15 October 2018, but I am satisfied that this is correct, having cross checked the spreadsheet with the timesheets.

[12] Section 24 of the Holidays Act deals with the calculation of annual holiday pay if employment ends and entitlement to holidays has arisen. It provides as follows:

24 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 is entitled to annual holidays; and
 - (c) 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

[13] “Ordinary weekly pay” is defined in s 8 of the Holidays Act as follows:

8 Meaning of ordinary weekly pay

- (1) In this Act, unless the context otherwise requires, **ordinary weekly pay**, for the purposes of calculating annual holiday pay,—
- (a) means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and
 - (b) includes—
 - (i) productivity or incentive-based payments (including commission) if those payments are a regular part of the employee’s pay:
 - (ii) payments for overtime if those payments are a regular part of the employee’s pay:
 - (iii) the cash value of any board or lodgings provided by the employer to the employee; but
 - (c) excludes—
 - (i) productivity or incentive-based payments that are not a regular part of the employee’s pay:
 - (ii) payments for overtime that are not a regular part of the employee’s pay:
 - (iii) any one-off or exceptional payments:
 - (iv) any discretionary payments that the employer is not bound, under the terms of the employee’s employment agreement, to pay the employee:
 - (v) any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

- (2) If it is not possible to determine an employee's ordinary weekly pay under subsection (1), the pay must be calculated in accordance with the following formula:

$$\frac{a - b}{c}$$

where—

- a is the employee's gross earnings for—
(i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or
(ii) if the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made
- b is the total amount of payments described in subsection (1)(c)(i) to (iii)
- c is 4.
- (3) However, an employment agreement may specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay if the rate is equal to, or greater than, what would otherwise be calculated under subsection (1) or subsection (2).

[14] The Ordinary Weekly Pay as at the end of Ms Bennett's employment was \$332. The average weekly earnings during the 12 months immediately before the end of the last pay period before the end of employment was \$388.80. This latter sum is therefore the rate at which Ms Bennett's 36 days of unpaid final holiday pay should be calculated. The sum owed to Ms Bennett is therefore the gross sum of \$2,799.36. This is calculated by dividing 36 days by 5, and multiplying the result of 7.2 by \$388.80.

Public holiday pay

[15] Ms Bennett did not work on public holidays. Section 49 of the Holidays Act provides that, if an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

[16] It appears that Ms Bennett was paid for most of the public holidays that fell during her employment. This is confirmed in both the timesheets and the spreadsheet.

However, there were six public holidays in 2014 which were not paid. These were Good Friday and Easter Monday, Anzac Day, Queen's Birthday, Labour Day and Marlborough Anniversary Day.

[17] I am satisfied that all of these days fell on days that would otherwise have been a working day for Ms Bennett, as she worked every week day except Thursday in 2014.

[18] "Relevant daily pay" is defined as

(1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave,—

(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and

(b) includes—

(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned:

(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned:

(iii) the cash value of any board or lodgings provided by the employer to the employee; but

(c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if the rate is equal to, or greater than, the rate that would otherwise be calculated under subsection (1).

(3) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

[19] At the time when these public holidays fell, Ms Bennett was earning \$15 an hour and worked most days for 5.5 hours a day. I shall therefore assume that she would have done so had she worked on the six public holidays in question. This

means that Ms Bennett is entitled to be paid \$495 gross in relation to the six public holidays in 2014 for which she received no pay.

Minimum wage

[20] The adult minimum wage was \$15.25 from 1 April 2016 and \$15.75 from 1 April 2017. However Ms Bennett was paid at \$15 an hour until 23 April 2017, when her pay rate increased to \$16 an hour. Therefore, Ms Bennett was paid at below the statutory minimum wage rate for the whole of her third year of employment and for three weeks of the fourth year of employment. Ms Bennett is owed arrears of \$304.38 gross for the third year of employment and \$73.75 gross for the fourth year.

Orders

[21] I order Ms Campbell to pay to Ms Bennett by no later than Friday 25 January 2019 the following sums:

- (a) \$3,672.49, being arrears of final holiday pay, public holiday pay and minimum wages owed; and
- (b) \$71.56, being the fee that Ms Bennett had to pay to lodge her claim with the Authority.

Costs

[22] As Ms Bennett was not represented by a professional adviser in these proceedings, I make no further order as to costs.

David Appleton
Member of the Employment Relations Authority