



[4] At 7am today (the day of this investigation meeting) the wife of Paul Hinton who is Farm Beach's sole director and shareholder emailed the Authority to say he would not be appearing at the investigation meeting because his truck had broken down.

[5] The investigation meeting did not start until 9.30am so Mr Hinton had approximately two and a half hours to arrange for alternative transport from where he was (he lived at Farm Beach's registered office) to the investigation meeting.

[6] This was a distance of approximately 6km which would have taken less than ten minutes to drive and cost approximately \$20 to taxi. If Farm Beach had wanted to participate in the Authority's investigation process, then it had ample opportunity to do so.

### **Respondent's failure to comply with Authority's directions**

[7] On 19 July 2019 the Authority wrote to the parties, and among other things, ordered Farm Beach to provide specific information that was relevant to its investigation to the Authority by 3:00 pm on 26 July 2019. No response was received.

[8] The Authority also advised Farm Beach that because it had not filed a Statement in Reply within fourteen days of having Mr Taylor's Statement of Problem served on it, it had to seek leave from the Authority to file a Statement in Reply out of time, if it wanted to defend Mr Taylor's claims.

[9] Farm Beach was given until 3:00 pm on 26 July 2019 to file a leave application and the Authority identified the information that would be required to support such an application. No response was received from Farm Beach.

### **Issues**

[10] The following issues are to be determined:

- (a) Did Farm Beach unjustifiably disadvantage Mr Taylor?
- (b) Did Farm Beach unjustifiably dismiss Mr Taylor?
- (c) If so, what if any remedies should be awarded for any personal grievance claims that succeed?
- (d) Is Mr Taylor owed wage arrears for unpaid annual holiday entitlements?

(e) What if any costs should be awarded?

**Did Farm Beach unjustifiably disadvantage Mr Taylor?**

[11] Mr Taylor started work for Farm Beach as a truck driver on or about 23 April 2018. On 22 November 2018 Mr Taylor saw on his payslip that instead of paying him his normal wages, Farm Beach had recorded that Mr Taylor had used a week of paid annual holiday.

[12] Mr Taylor pointed out to Mr Hinton that he (Mr Taylor) had been at work as normal and had not applied for or used any annual holiday. Mr Taylor asked why his payslip showed he had taken five days' of annual leave the previous week.

[13] Instead of responding to Mr Taylor's query, on 25 November 2018 Farm Beach sent him an email saying he had been dismissed and that he would be paid two weeks' of his annual holiday pay as his notice.

[14] Farm Beach's notice of termination did not give any reasons for Mr Taylor's dismissal and it advised Mr Taylor that he owed it \$491.25.

[15] Mr Taylor has established that Farm Beach's unilateral 'selling off' of his annual holiday entitlements unjustifiably disadvantaged him.

[16] Farm Beach paid Mr Taylor \$1,000 holiday pay for the week ending 18 November 2018, \$1,000 holiday pay for the week ending 2 December 2018 and \$1,000 holiday pay for the week ending 9 December 2018.

[17] Farm Beach had no right to pay out \$3,000 in holiday pay to Mr Taylor who had not asked for annual holiday, who did not want to use his annual holiday entitlement, who had not accrued that much annual holiday because he had not worked for a full 12 months, and who had not been instructed by Farm Beach to take paid annual holiday in advance of his entitlement.

[18] Mr Taylor was clearly unjustifiably disadvantaged because of the way in which Farm Beach dealt with his annual holiday in November and December 2018.

[19] Mr Taylor was entitled to take paid annual holiday on dates nominated by him and agreed with by Farm Beach, as he had with the agreed annual holiday he took in September 2018.

[20] Farm Beach as an employer is not able to unilaterally decide to suddenly pay out Mr Taylor's annual holiday entitlements, because such actions breach the HA03.

### **Was Mr Taylor unjustifiably dismissed?**

[21] Farm Beach's email dated 25 November 2018 dismissed Mr Taylor 'out of the blue.'

[22] Farm Beach's dismissal was more likely than not done in retaliation for Mr Taylor querying the improper and unlawful way in which Farm Beach had dealt with his annual holiday entitlements.

[23] Mr Taylor has discharged his onus of establishing on the balance of probabilities that he was unjustifiably dismissed from his employment.

[24] There is no information before the Authority to suggest that Farm Beach had a good reason for dismissing Mr Taylor in the way that it did. It also failed to comply with its statutory good faith obligations or with any of the four procedural fairness tests in s 103A(3) of the Employment Relations Act (the Act).

[25] These procedural fairness breaches were serious and resulted in considerable unfairness to Mr Taylor, so s 103A(4) of the Act does not apply.

[26] Farm Beach's dismissal of Mr Taylor was substantively and procedurally unjustified.

### **What if any remedies should be awarded?**

#### *Mitigation*

[27] Mr Taylor appropriately mitigated his loss.

[28] Mr Taylor was out of work for eight weeks from 9 December 2018 to 3 February 2019.

#### *Lost remuneration*

[29] Under the terms of his employment agreement Mr Taylor was paid \$25 per hour for 40 hours per week. He was paid the same hourly rate for any overtime he worked.

[30] Mr Taylor seeks to recover lost remuneration of \$8,650, being \$1,000 ordinary time wages plus \$81.06 average overtime per week for the eight week period from 10 December 2018 to 3 February 2019.

[31] Farm Beach is order to pay Mr Taylor \$8,650 lost remuneration under s 128(2) of the Employment Relations Act 2000 (the Act).

*Distress compensation*

[32] In his Statement of Problem Mr Taylor sought \$10,000 distress compensation, so the Authority was limited to awarding that as a maximum amount.

[33] Mr Taylor gave evidence about the considerable stress and distress he suffered as a result of his unexpected dismissal just before Christmas and about how he could not find work because employers did not want to employ a new employee, and therefore have to pay statutory holidays over the holiday period.

[34] Compensation for Mr Taylor's disadvantage and dismissal grievances has been consolidated into one award of distress compensation, because his two grievance claims are so closely entwined.

[35] Farm Beach is ordered to pay Mr Taylor \$10,000 under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his personal grievances.

[36] Section 124 of the Act requires the Authority to consider whether the remedies Mr Taylor has been awarded should be reduced on the grounds of contribution. Contribution denotes blameworthy conduct.

[37] There was no evidence before the Authority to suggest that Mr Taylor had contributed to the situation which gave rise to his dismissal grievance.

[38] There was nothing improper or blameworthy about Mr Taylor expressing to Farm Beach that it was not entitled to unilaterally pay him out his annual holiday entitlements, because that breached the Holidays Act 2003.

[39] Remedies are therefore not to be reduced on the grounds of contribution.

**Is Mr Taylor owed wage arrears?**

[40] Mr Taylor said he took 7 days of agreed advance paid annual holiday on 13, 14, and 17-21 September 2018.

[41] Mr Taylor was employed from 23 April 2018 to 9 December 2018, a period of 33 weeks, at \$1,000 gross ordinary time wages per week. Using a termination date of 9 December 2019 Mr Taylor's ordinary time gross earnings while employed should have been \$33,000 gross, inclusive of the paid advance annual holiday he took in September 2018.

[42] However Mr Taylor also worked a total of 107 hours overtime over the 33 weeks he was employed, which was paid at his normal hourly rate of \$25 per hour. This works out at on average 3.24 hours of overtime each week or \$81.06 on average in overtime pay per week.

[43] Mr Taylor's total gross overtime pay of \$2,675 has to be added to his ordinary time pay of \$33,000 bringing his total gross earnings while employed to \$35,675.

[44] Because Mr Taylor had worked for less than 12 months, s 23(1) of the Holidays Act 2003 (HA03) provides that he was entitled to be paid 8% of his total gross earnings as annual holiday pay upon termination of his employment.

[45]  $\$35,675 \times 8\% = \$2,854$  annual holiday pay in accordance with s 23(1) of the HA03.

[46] Under s 23(2) of the HA03 the annual holiday pay Mr Taylor had been paid in advance while employed was to be deducted from \$2,854 (being 8% of total gross earnings) that was calculated under s 23(1) of the HA03.

[47] Mr Taylor was paid \$1,400 for annual holiday pay (being \$400 for 13 & 14 September and \$1,000 for 17-21 September) for annual holiday he applied for and was granted by Farm Beach while employed. That amount of \$1,400 (advance holiday pay) must therefore be deducted from the total gross annual holiday pay of \$2,854 he was entitled to under HA03.

[48]  $\$2,854 - \$1,400 = \$1,454$ . That \$1,454 is the amount of outstanding annual holiday entitlement Mr Taylor was owed. Adding Mr Taylor's total gross earnings of \$35,675 plus his annual holiday entitlement arrears of \$1,454 gives a total of \$37,129.

[49] \$37,129 is the total gross wages, including holiday pay entitlements that Mr Taylor should have been paid by Farm Beach, if it had paid him correctly.

[50] According to an IRD print out that Mr Taylor gave the Authority, Farm Beach paid him in total \$34,560 gross, inclusive of his annual holiday pay entitlements.

[51] Mr Taylor is therefore owed wage arrears of \$2,569; being \$37,129 he should have been paid less the \$34,560 he was in fact paid.

[52] Mr Taylor's wage arrears claim succeeds and Farm Beach is ordered to pay Mr Taylor \$2,569 wage arrears for unpaid annual holiday entitlements.

### **What if any costs should be awarded?**

[53] Mr Taylor as the successful party is entitled to a contribution towards his actual legal costs, his filing fee and the costs he incurred for undertaking personal service of these proceedings on Farm Beach at its registered address for service.

[54] Costs are assessed in accordance with the Authority's notional daily tariff, which is currently \$4,500 for the first day of an investigation meeting.

[55] Farm Beach is ordered to pay Mr Taylor \$1,200 (on a pro-rated basis) towards his actual legal costs and to reimburse him \$71.56 for his filing fee.

[56] Farm Beach is also ordered to reimburse Mr Taylor \$380.50 for the service fees he has incurred, as a result of having to have these proceedings personally served on Farm Beach.

### **Orders**

[57] Mr Taylor's unjustified disadvantage and unjustified dismissal grievance claims, and wage arrears claim, succeed.

[58] Within 28 days of the date of this determination, Farm Beach is ordered to pay Mr Taylor \$22,871.06 consisting of:

- (a) \$2,569 wage arrears;
- (b) \$8,650 lost remuneration;

- (c) \$10,000 distress compensation;
- (d) \$1,200 legal costs;
- (e) \$71.56 filing fee; and
- (f) \$380.50 service fees.

**Rachel Larmer**  
**Member of the Employment Relations Authority**