

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 377
3023393

BETWEEN SHAUN ISAAC
 Applicant

AND ADVENTURE PLAYGROUND
 ROTORUA LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Fraser Wood, counsel for the Applicant
 Ken Patterson, counsel for the Respondent

Investigation Meeting: 14 and 15 March 2019 at Rotorua

Submissions [and further 2 April 2019 and 8 May 2019 from the Applicant
Information] Received: 16 April 2019 from the Respondent

Date of Determination: 25 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Isaac) claims that he was constructively dismissed by the respondent (APR or the employer) and that he is due unpaid wages, holiday pay, and penalties because of the employer's default.

[2] The employer resists those claims and counterclaims that it is owed money by Mr Isaac in respect to damage to company property and a shortfall in till payments.

[3] For his part, Mr Isaac resists all the aspects of the counterclaim.

[4] For ease of determination, I intend to deal with the two matters, the original statement of problem filed by Mr Isaac and the counterclaim filed by APR, as one matter, and to deal

with all of the outstanding issues in this single determination. This is so notwithstanding the fact that the counterclaim was separately filed under number 3028614.

[5] This approach has been facilitated by counsels' agreement on a memorandum of issues which, despite some squabbling about exactly what was agreed, forms the basis of this determination.

[6] One final substantive issue relates to costs. APR were not ready to proceed with my investigation when the matter was originally set down for hearing on 12 December 2018 and I invited counsel to agree a basis on which the matter could proceed on the original dates, but no such agreement was forthcoming.

[7] Accordingly, I adjourned the matter for new dates to be fixed and indicated that the deferral would sound in costs in favour of Mr Isaac who was ready, willing and able to proceed on the original dates. I have received separate submissions from both parties in respect to that cost issue and I will deal with that in this determination as well.

[8] APR commenced the ownership of the subject business around the middle of 2012 providing horse riding, quad bike riding, skeet shooting and side-by-side all terrain buggies in the Rotorua hinterland.

[9] Mr Isaac commenced an engagement with APR on 8 January 2013. It appears to be common cause that for the period from the commencement of the engagement down to 17 April 2013, Mr Isaac was effectively working to pay off an Audi A4 motor vehicle which was eventually transferred from the ownership of APR to the ownership of Mr Isaac's wife.

[10] After Mr Isaac's work for the employer became full time, there was an individual employment agreement presented but not signed by either party. Subsequent to the hearing, and subject to my explicit consent, counsel were given permission to file and serve additional evidence by way of affidavit. Attached to the affidavit of Steven James Roberts, the managing director of the employer, is an employment agreement which appears to be signed by Mr Isaac and although neither signed by the employer nor dated, is said to be "created and signed" on 3 May 2015.

[11] Throughout the evidence, there was reference to two employment agreements, and it seems to me likely that this agreement may have been the second agreement.

[12] I reached this conclusion because if the employer party were minded to create an individual employment agreement to take effect from 2015, given that Mr Isaac commenced full time employment around September 2013, it seems more likely than not that an earlier unsigned and undated employment agreement may have applied from around September 2013.

[13] It appears that from around the time that Mr Isaac commenced full time employment with the employer, there were occasional difficulties for Mr Isaac with driving while intoxicated. The employer's evidence was that they were supportive of Mr Isaac during these occasional lapses.

[14] APR also maintain that they had occasion to speak to Mr Isaac on regular occasions about his scruffy presentation and his smoking on the job although Mr Isaac's evidence denies that those "fire side chats" ever took place.

[15] There is also dispute about whether the employment relationship ended acrimoniously or not; Mr Isaac's evidence is that he sought to resign on two occasions, carrying through with that intention on the second occasion. Further, Mr Isaac says that the reason that he sought to leave the employment was that Mr Roberts treated him in an off-hand and dismissive fashion and was frequently rude to him. Evidence for the employer is to deny any such behaviour on the part of Mr Roberts.

[16] The counterclaim issues were never formally raised with Mr Isaac during the employment although it is common ground that Mr Roberts was aware of the issues at the time.

[17] Mr Isaac says that the employment came to an end in July 2014 when he resigned his employment because he says he had "had enough of being treated like shit". Whether or not that was the position is in question.

[18] After the employment a personal grievance was raised, and the matter proceeded to the Authority in the usual way.

Issues

[19] Counsel in this matter agreed a list of issues and the determination proceeds more or less entirely from this point to address those agreed issues.

[20] The issues counsel have identified for determination by the Authority are as follows:

- (a) Was Mr Isaac working as an independent contractor for the period 8 January 2013 to 17 April 2013?
- (b) If not, was Mr Isaac due arrears of wages for the period 8 January 2013 to 17 April 2013 being the time that he was purportedly working for an Audi A4 motor vehicle?
- (c) Was Mr Isaac working as an independent contractor for any part of the period 17 April 2013 to 17 September 2013?
- (d) If not, is Mr Isaac due arrears of wages for the period 17 April 2013 to 17 September 2013?
- (e) Is Mr Isaac entitled to arrears of wages for the period 19 September 2013 to August 2014 for time worked over and above 37.5 hours per week?
- (f) Is Mr Isaac entitled to arrears of wages for the period August 2014 to 10 May 2017 for time worked over and above 45 hours a week?
- (g) On what dates was Mr Isaac employed and entitled to statutory holiday payments?
- (h) On what dates was Mr Isaac paid annual holiday pay?
- (i) Were these payments made with his request and/or knowledge?
- (j) Were those sums correctly paid as annual holidays?
- (k) On what dates did Mr Isaac become entitled to an alternative holiday with respect to scheduled work on a public holiday?
- (l) Which of these alternative holidays did Mr Isaac receive payments for?
- (m) Were there any payments for alternative holidays made to him without his request and/or knowledge?
- (n) If so, is Mr Isaac entitled to payment for alternative holidays paid out without his knowledge and/or consent?
- (o) Was Mr Isaac constructively dismissed from his employment with Adventure Playground Limited?

- (p) Did the Land Rover suffer damage as a result of the manner in which Mr Isaac drove it?
- (q) Is Mr Isaac responsible for meeting repair costs of the Land Rover?
- (r) Is Mr Isaac liable for the alleged shortfall in payment for the bike that he collected payment for?
- (s) Did Mr Isaac's duties include cashing up and accounting for all cash, eftpos and/or credit card payments each day?
- (t) Were there shortfalls and/or inconsistencies in the cash-up which occurred when Mr Isaac was undertaking that work?
- (u) Were any shortfalls/inconsistencies in the cash-up brought to Mr Isaac's attention during the course of his employment?
- (v) Did Mr Isaac fail to correctly install/connect the security camera to the recording box, and if so, did Mr Isaac breach a duty of care in doing so?
- (w) Is Mr Isaac liable for any of the alleged losses sustained in terms of shortages of money in the till?

[21] However, before those questions are individually addressed, I think it appropriate to make some observations about the applicable law.

The Applicable Law

[22] The central challenge in determining this matter is the paucity of records retained by the employer in respect to time worked and wages paid. In that regard, the employer is in breach of his obligation under the law. More importantly, by virtue of that default the employer makes it incredibly difficult for an outside third party (such as an Authority Member) to reach conclusions which are sympathetic to his position.

[23] This is because in the absence of any robust record-keeping of the sort mandated by the law, the employer is always going to struggle to persuade a Labour Inspector, a former employee or a Judge or Authority Member of the veracity of his position because he simply does not have the factual matrix to support his evidence.

[24] Put shortly, the law on the matter is clear and for the avoidance of doubt, I outlined it at the investigation meeting lest anybody be in any doubt about the applicable provision.

[25] Section 132 of the Employment Relations Act 2000 (the Act) confers on the Authority the right to place reliance on the calculations presented by the employee in circumstances where the employer had failed in his legal duty to maintain proper wage and time records unless the employer is able to satisfy the Authority that those calculations submitted by the employee are fundamentally flawed or that some of them are.

[26] That is the overarching principle which is going to decide the present case because it is common ground that APR has failed absolutely to maintain proper wage and time records throughout the employment. It is true that there are some records for some periods of the employment, but it is the case that looking at the employment as a totality, there is no continuous original wage and time record applying to the employment of Mr Isaac by APR.

[27] That means that unless APR can satisfy me that the calculations made on behalf of Mr Isaac are flawed or that some of them are, I am entitled to rely on Mr Isaac's calculations.

[28] Of course, the provision is not there simply to provide a benefit to an employee; rather it is based on the standard legal principle that a claimant must have the onus of meeting the evidentiary burden to prove their claim and, in the absence of the records that ought to have been maintained by the employer and which the law mandates, reliance can instead be placed on the records submitted by the claimant employee subject to that proviso that the Authority may take account of any convincing challenges to part or all of that claim, where those challenges are mounted by the employer.

[29] Moreover, by virtue of the failure of APR to maintain proper wage and time records for Mr Isaac's employment, APR is not able to demonstrate conclusively that Mr Isaac has been paid the minimum wage for all hours worked. This is for the very simple reason that the law, as counsel for Mr Isaac correctly observes in his submissions for his client, requires the applicable minimum rate of pay to be paid to the worker for "each and every hour worked: *Idea Services v Dickson* [2011] NZCA 14 at [26].

[30] Of course, without a complete record of the wages earned by Mr Isaac married to the hours for which those payments applied, it is impossible for APR to satisfactorily demonstrate that Mr Isaac was paid the minimum wage for all of the employment.

[31] There is an issue in respect to the Wages Protection Act 1983, as well. In the present case, there is a question of deductions being made from Mr Isaac's pay which he says he has

not consented to and for which there is no written consent by Mr Isaac to that deduction being made. In principle, that fact summary is a breach of the Wages Protection Act 1983.

[32] The Holidays Act 2003 entitles an employee to receive four weeks' annual holidays after each twelve months of continuous service. How that annual holiday is to be paid for is set out in the statute.

[33] Because of the paucity of the employer's records, it is impossible to discern whether annual holidays were correctly taken in all cases and whether they were correctly paid for.

[34] A further issue under the Holidays Act is the ability to "cash-up" a portion of the annual holiday entitlement. Again, this is an issue in the present case. In the absence of proper record keeping, arrangements for cashing-up are called into question.

[35] Furthermore, the Holidays Act provides that where an employee works on a public holiday he is required to be paid at an enhanced rate of pay and in circumstances where he has an entitlement to an alternative holiday where the public holiday that the employee worked on is an otherwise working day for the employee, those arrangements must be faithfully performed by the employer for the benefit of the employee.

[36] Again, the paucity of wage and time records makes it impossible to be absolutely satisfied that Mr Isaac has had his legal entitlement to annual holidays and public holidays.

[37] I agree with the various judicial pronouncements about the widespread knowledge within the community about workers' entitlements to these provisions and accept the proposition that it cannot be that small business owners do not have access to information which would assist them to come to grips with their obligations in the event they were unsure about them.

[38] Counsel for Mr Isaac refers to wage and time records as being "foundation documents" on which wage and leave entitlements are based and I think that is a good characterisation of the position. To put that point another way, they are the original source documents and it is not enough, as APR sought to maintain in my investigation meeting, that some anyway of this original source material had been transferred to payslips which it was said (although this was disputed) were available to Mr Isaac at any time. Of course, unless the original source documents can be produced, it is difficult for the employee, who is

entitled as of right to review that documentation, to assess whether the information conveyed on the payslip accurately and faithfully records the position. The payslip is not an original document; it is a creation of an accounting system and as such is only as good and as accurate as the material that was put into it in the first place.

[39] The evidence is that Mr Isaac requested access to his wage and time records on a regular basis throughout the employment.

[40] APR say that their payroll system known as iPayroll was in place from 4 September 2014 (a date which post-dates the commencement of the employment by some 18 months) but that point aside, Mr Isaac's evidence is that he did not gain access to the iPayroll system until 13 December 2016. That point is disputed by the employer, but again the fundamental issue is that all the iPayroll system could provide is payslips that are generated by the electronic system. Those payslips are not wage and time records and indeed, the payslips are only as reliable as the material that is inputted into the electronic system to generate them. They cannot be original source documents.

[41] After the employment relationship concluded, Mr Isaac requested access to the original source documentation for wage and time records and holiday information on 20 May 2017 and again through counsel on 27 June 2017, 22 August 2017 and 8 September 2017. Once the matter was filed in the Authority, the Authority itself directed that the employer was to provide wage and time records to Mr Isaac. That direction was made on 21 March 2018.

[42] Some wage and time records were provided by APR on 6 April 2018 but the material is incomplete and Mr Isaac says they are also inaccurate. Of particular concern is the evidence that APR have destroyed the majority of the timesheets for Mr Isaac. Mr Isaac's evidence on the point, which I accept, is that he completed weekly timesheets at the conclusion of each week which detailed the work done for that preceding week.

[43] APR says that the material on the timesheets was faithfully transcribed into the electronic system and was then recorded on the electronic payslips. But in the absence of the source documentation, that claim is unable to be verified.

[44] Even if it were true that all of the material on the timesheets was faithfully transcribed into the electronic system, the destruction of the majority of those timesheets leaves APR

unable to demonstrate that as a fact and by destroying the timesheets, the employer is effectively confirming its breach of the law that requires those documents to be retained.

[45] Because Mr Isaac has expressed doubt at the veracity of what date and time records are available from the employer, he has had to undertake the laborious task of trying to construct a wage and time record for himself for the totality of the employment.

[46] I heard evidence from Mr Isaac about how he had attended to that task and I must pay tribute to his legal advisers who have, I fancy, taken a large share of the burden of putting that material together.

[47] Lest the matter be in any doubt, I have not been persuaded by any of the attacks mounted for APR on Mr Isaac's reconstructed records. As I have emphasised throughout this determination to date, in the absence of wage and time records as mandated by the law, an employer is in a challenging position in seeking to quarrel with claims made by their employee.

[48] In the particular circumstances of this case, I have not been persuaded that APR's generalised complaints about Mr Isaac's calculations have any force or effect; nor do I find persuasive any of the particular attacks that Mr Roberts for APR makes in respect to Mr Isaac's calculations. There is a short section of Mr Roberts' evidence in which he attempts to quarrel with some of Mr Isaac's calculations, but I am not persuaded by those apparent objections.

[49] Even Mr Isaac himself seems to accept that some of his claim can only be described as a "best guess" but conversely, other aspects of the claim seem quite robust. For instance, in that latter connection, the period when Mr Isaac was on home detention as a consequence of a conviction for driving while intoxicated, would seem, as counsel for Mr Isaac submits, to be very robust indeed. This is because his arrival and departure from work with the employer was signed off by mostly Mr Roberts himself, but occasionally by another work colleague.

[50] Mr Roberts sought to maintain in his evidence that he had signed these forms in bulk and in advance but therefore, the records could not be relied upon. I have not been persuaded by Mr Roberts' evidence that these documents were signed in bulk; there is no corroborating evidence to support that contention and it seems to me inherently unlikely that a responsible employer would take such a step.

[51] Moreover, even if that were true, that does not explain the minority of the forms which were signed off by another work colleague, unless of course it were to be contended that other work colleague was also signing the forms in bulk and in advance. I did not hear evidence from the other signatory and therefore I do not feel entitled to take that issue any further.

[52] Put simply, I apply s 132(2) of the Act in the present case and, in the absence of proper wage and time and holiday records from the employer, I choose to rely upon the records generated by Mr Isaac and put before me as evidence of the hours worked, wages due and owing, and holiday and other entitlements.

Was Mr Isaac working as an independent contractor for the period 8 January 2013 to 17 April 2013?

[53] It is apparent on the evidence that Mr Isaac was engaged in some capacity, and on some terms, between these two dates. The nature of the engagement is uncertain, as are the terms. In what becomes a regular pattern, there are no wage time records available from APR.

[54] While Mr Isaac was clear in his evidence that he was an employee during the relevant period, APR's position seems to have changed regularly.

[55] Of course, the Authority must determine the "real nature" of the relationship: s 6 of the Act applied. Typically, courts and tribunals assess the real nature of the relationship by looking at the common law tests that have been developed over the years and applying them to the factual matrix.

[56] If the control test were applied to the facts as I heard them, it is difficult not to see Mr Isaac being under the direct control of APR and working as and when they directed. In that regard, I observe that the only evidence offered by APR that is of any tangible assistance for this period is a series of diary entries which note the various tours that Mr Isaac led on behalf of APR. It is difficult to see how Mr Isaac would know when and where he was required unless he were "controlled" by APR.

[57] Moreover, without being "integrated" into the affairs of APR, by wearing APR's uniform and using their tools and property including vehicles, Mr Isaac could not have performed his obligations.

[58] Nor is there any evidence of the “economic realities” of contracting present in the current case. Mr Isaac did not render and invoice for each and every service, or indeed a monthly invoice; he was paid money into his bank account, once he began to receive payment at all, and that payment was shorn of the PAYE commitment at source. There is nothing in Mr Isaac’s behaviour to suggest that he was operating this particular enterprise as a contractor despite the fact that it is acknowledged that Mr Isaac had another enterprise installing Sky Television aerials.

[59] I conclude then that Mr Isaac was an employee for the relevant period and that he is entitled to payment of wages for that period.

Is Mr Isaac entitled to wages for that period?

[60] Having determined that Mr Isaac was an employee for the relevant period, it follows that he is entitled to wages for that same period. The evidence is that over this period, the parties had agreed that Mr Isaac would work for the value of an Audi A4 motor car which by common consent was valued at \$4,000 and that when that sum had been worked off, the Audi vehicle would be transferred to Mr Isaac’s ownership.

[61] Consistent with that understanding, it is again common cause that no actual payments were made by APR to Mr Isaac for the relevant period.

[62] The issue though is whether the payment of money value in the car (\$4,000) was sufficient recompense for wages for the relevant period. I hold that it was not.

[63] I reach this conclusion because in the absence of any proper wage and time records from APR, I am forced to rely on the reconstruction provided by Mr Isaac the essence of which is that during the period that APR says that Mr Isaac was simply turning up to do an occasional tour, he was in fact working full-time. Put shortly, that is Mr Isaac’s evidence and I accept that at face value. None of the evidence put before me by APR displaced the view that Mr Isaac did more than simply take the occasional tour. Mr Isaac’s evidence is that during the relevant period, he worked an average of 37.68 hours per week and in the absence of any contrary evidence from APR, I am bound to accept that.

[64] The next question is to determine the terms of that engagement and in particular the hourly rate. Again, there is no evidence at all from APR that is of any assistance. Accordingly, all I can do is follow the suggestion from submissions from Mr Isaac and apply

the Minimum Wage Act. On this footing, and after deducting the \$4,000 for the Audi motor car, Mr Isaac is owed \$3,772.19 gross.

Was Mr Isaac working as an independent contractor during the period 17 April 2013 – 17 September 2013?

[65] I agree with Mr Isaac's closing submissions that there is no reliable evidence that Mr Isaac was at any stage of the engagement working with APR as a contractor and that includes during this particular period.

[66] A factor which tends to support that general contention is that from April 2013 onwards, Mr Isaac began to receive small payments by direct credit to his bank account from which PAYE had been deducted. That suggests that APR regarded him as an employee during the relevant period.

Is Mr Isaac due wages for the period 17 April 2013 to 17 September 2013?

[67] Given my conclusion that Mr Isaac was during this period an employee rather than a contractor, it follows that he is entitled to payment of at least the minimum wage for every hour worked.

[68] During this period, Mr Isaac was paid \$50 net per day notwithstanding the evidence for APR, which was that Mr Isaac was paid at a piecework rate of \$25 per tour. There was a good deal of evidence on this point and I note in the cross-examination of Mr Roberts on this issue, he was unable to explain the difficulty in marrying the piece work claim to the records which showed a daily payment into Mr Robert's bank account of \$50 net.

[69] I find that Mr Isaac is due a total of \$6,089.55 gross being the difference between the payments received on account, and the payments due at minimum wage, based on the hours claimed by Mr Isaac.

Is Mr Isaac entitled to arrears of wages for the period 19 September 2013 to August 2014 for time worked beyond 37.5 hours per week?

[70] APR has tried to deal with this claim by maintaining that Mr Isaac was paid a salary and therefore was not entitled to any payment beyond the hours originally set down. But that evidence is inconsistent with the facts. There seem to have been two employment

agreements between these parties; there was certainly one and perhaps a second one. Neither document contemplated a salaried arrangement. Moreover, both documents contemplated 37.5 hours per week as the span of hours required to ordinarily be worked. Moreover, and critically, Mr Roberts conceded in cross-examination that in fact, from time to time, Mr Isaac worked longer than 37.5 hours per week.

[71] So the first issue is that I reject the suggestion by APR that Mr Isaac was in receipt of a salary. There was no evidence whatsoever to support that contention. As well as the points I have already made on that issue, perhaps the most telling is that it is apparent on looking at what documentary evidence there is, that the applicant's hourly rate changed over time. A perusal of his bank statements makes that clear, and the other corroborative evidence is also plain that his wage rate went up as the employment continued.

[72] I am satisfied that during the relevant period, Mr Isaac was short paid the sum of \$3,364.89 gross calculated at the wage rate of \$17.50 per hour which is the payrate for the employment agreement during the relevant period.

Is Mr Isaac entitled to arrears of wages for the period August 2014 to 10 May 2017 for time worked beyond 45 hours per week?

[73] The evidence I heard seems plain enough that in about August 2014, the informal independent employment agreement between these parties was varied to reflect the fact that Mr Isaac was asked to work six days a week rather than five (37.5 hours becomes 45 hours per week).

[74] The agreement between the parties was that Mr Isaac be paid a minimum of 45 hours per week (whether or not he worked that many hours) and where he worked beyond 45 hours per week, he would be paid for each of those hours at his usual hourly rate as well. Mr Roberts conceded that agreement in cross-examination.

[75] It follows that there are two inquiries to be made for the relevant period. The first is whether there were weeks when Mr Isaac did not receive 45 hours payment, and the second is whether there were weeks when Mr Isaac worked beyond 45 hours per week but was not paid for those hours beyond the 45 hours.

[77] There were 19 pay weeks when Mr Isaac did not receive the guaranteed minimum of 45 hours per week of paid time and the shortfall amounts to \$3,047.14 gross.

[78] There were also weeks where the applicant worked more than 45 hours and where he was not paid for those additional hours. The total shortfall that he is entitled to in that regard is \$10,373.97 gross.

On what dates was Mr Isaac employed and entitled to annual holidays?

[79] Mr Isaac commenced employment as we have already decided on 7 January 2013. He has worked continuously since that date until the termination of the employment; as I have already made clear, I have not been persuaded that Mr Isaac's status changed to that of an independent contractor or indeed that he became a casual employee as APR has contended in some documents. I am satisfied Mr Isaac worked week to week and a consistent span of hours although I am also satisfied that those hours varied depending on the needs of the business.

[80] The effect of the Holidays Act 2003 is to give Mr Isaac an entitlement to four weeks' paid holidays on the completion of 12 months continuous employment. That means that on each of 8 January 2014, 8 January 2015, 8 January 2016, and 8 January 2017, Mr Isaac accrued four weeks paid holidays. Moreover, in the final period of the employment from 8 January 2017 to 22 May 2017, Mr Isaac would have been entitled to a further 8 percent of his gross earnings for that period pursuant to s 25 of the Holidays Act 2003.

On what dates was Mr Isaac paid annual holiday pay and were those payments made at his request and/or knowledge?

[81] Put shortly, Mr Isaac's evidence (which I accept) is that he received some payment for genuine holidays which he agreed to take and which were properly paid and other payments were made to him as holiday pay without his request knowledge or consent.

[82] There is no proper holiday record provided by APR and in the absence of any such record, I am again forced to rely on the calculation in recollection of Mr Isaac as the law entitles me to do.

Were those sums correctly paid as annual holidays?

[83] I am satisfied on the evidence before me that the annual holiday payments made to Mr Isaac were not calculated correctly. It appears that they were calculated as hours not as the greater of average weekly earnings or ordinary weekly pay as the Holidays Act 2003 requires.

[84] More than that, I am satisfied that Mr Isaac made no written requests for annual holidays to be paid out but even if he had, the amount that has been paid out in the last two years of the employment greatly exceeds the statutory maximum which seems to me to give the lie to any suggestions by APR that that they were clear about their legal obligations. So not only do I accept that Mr Isaac did not make those requests, but also the pay-outs in question greatly exceed (for the last two years) the legal maximum applying.

[85] As Mr Isaac's closing submissions correctly observe, the point of providing an annual holiday on pay is to encourage workers to have an appropriate period of rest and recreation, but despite that, the evidence here is clear that Mr Isaac has been paid annual holiday pay without his request or knowledge when he was not away on holiday.

[86] In addition, Mr Isaac's evidence is that he was paid annual holiday pay on a regular day off, also of course a payment made without his knowledge or request.

[87] I am satisfied that Mr Isaac is entitled to be paid 8.1 weeks of annual holidays which is the sum of annual holidays paid without his consent and annual holidays not paid at all.

On what dates did the applicant become entitled to an alternative holiday where scheduled work took place on a public holiday?

[88] I am satisfied on Mr Isaac's evidence that he is entitled to 33 alternative holidays. He lists these days in his written evidence to the Authority.

Which of these alternative holidays did Mr Isaac receive payments for?

[89] In Mr Isaac's written evidence to the Authority, which I am satisfied was not challenged by the employer, he sets out the alternative holidays for which he received payment notwithstanding this happened without his consent or knowledge and he maintains that this was done to effectively top up his wages to make it look as if he had been paid correctly. Mr Isaac claims 30 alternative holidays which have either been paid unlawfully during his employment or have not been paid at all.

[90] Moreover, Mr Isaac's essentially unchallenged evidence is that he worked on identified public holidays which were otherwise working days for him, but was not paid time and a half for the hours worked on those days.

[91] The total number of hours worked over these days was 72.75 hours. Divided by two that equates to 36.38 hours. At Mr Isaac's wage rate of \$20 per hour the value of the unpaid half time is \$727.50.

[92] I note for the sake of completeness that even with the work that Mr Isaac and his legal team have done to calculate his entitlement, there remains some calculations that have simply not been able to be attempted. For example for the period between 7 January 2013 to 4 September 2014, Mr Isaac's evidence is that he worked eight public holidays but he has no idea whether he was paid for those days or not. Similarly, he did not work on a number of other public holidays which were otherwise working days for him over that period and so he cannot determine, in the absence of proper records from the employer, if he was paid correctly for those days either.

Was Mr Isaac constructively dismissed from his employment with Adventure Playground Limited?

[93] Put shortly, Mr Isaac says that he left the employment because of constant belittling criticism of him coupled with derogatory language from Mr Roberts; Mr Roberts, on the contrary says that the termination of the employment was voluntary and that it was conducted in a friendly spirit as was the rest of the employment.

[94] There is an inconsistency here. While Mr Roberts sought to maintain that his relationship with Mr Isaac was more one of friendship than that between an employer and employee, his oral evidence was inconsistent with that. Mr Roberts seemed to want to belittle Mr Isaac, point up his personal difficulties and refer to him as the person who would cost the business a great deal of money by damaging plants and allegedly stealing from the till. I agree with submissions for Mr Isaac that none of that is consistent with the portrayal of a sunny relationship, with never a cross word.

[95] No doubt some of that negative feeling about Mr Isaac will have been generated by the fact of Mr Isaac's proceedings against the company but they are their own worst enemy; in the absence of paying employees correctly and keeping the records that are mandated by law, no employer can expect to defend this sort of proceeding successfully.

[96] Mr Isaac maintains that his employment came to an end by a constructive dismissal. That is to say that in effect the conduct of the employer towards him was so reprehensible

that he had no choice but to walk away. Certainly, that view of matters is consistent with the words Mr Isaac uses in his letter of resignation. But I have to say that I have not been persuaded that Mr Isaac has a personal grievance by reason of having been constructively dismissed.

[97] I think the truth of the matter is that the relationship between the two men was good, that they had a relatively harmonious relationship and that to use words in Mr Isaac's own submissions, "the reality was Mr Isaac was a trusted employee who had progressed through the organisation to be 2IC, was the person who greeted customers, received promotions and pay rises and was not subjected to any disciplinary actions".

[98] That seems to me to adequately describe the employment relationship as I understood it, and while the evidence is also clear that there were two flare ups between Mr Roberts and Mr Isaac I am not persuaded that either of them was sufficiently grave to constitute the "sending away" by Mr Roberts of Mr Isaac, that the law requires. To the contrary, I think the evidence suggests that these were no more than tiffs between two men who broadly speaking got on very well together.

[99] An example of that wholesome relationship is the way in which Mr Isaac dealt with the damage to the Land Rover vehicle while he was operating it. After the accident which did some damage to the vehicle, it seemed common ground that when Mr Roberts asked Mr Isaac about the damage, Mr Isaac said something to the effect, "just put it on my bill". That hardly suggests a tense relationship between the two; indeed quite the reverse, it rather suggests the sort of joking quasi familial relationship that I think the evidence as a whole supports.

[100] So I reject Mr Isaac's claim that he was constructively dismissed. I agree that he had no other job to go to, but I think he had simply reached a point where he felt there was not further growth for him in this particular employer and he decided to seek opportunities elsewhere. I do not think this contained the elements of a "sending away" which the law requires of a constructive dismissal.

Did the Land Rover suffer damage because of the way Mr Isaac drove?

[101] I have not been persuaded that Mr Isaac's driving was the cause of the undoubted damage to the Land Rover. The evidence is inconclusive.

[102] It is clear the Land Rover was damaged but the question whether that damage was a consequence of Mr Isaac's driving (which APR maintains) or of a mechanical fault (which Mr Isaac claims) is unclear.

[103] What is quite certain is that APR made no attempt to pursue this issue until the personal grievance was raised, which was fully eight months after the Land Rover incident.

Is Mr Isaac responsible for meeting the repair costs?

[104] I answer this question in the negative; the employer has failed to satisfy me of the damage sustained by the incident or the costs of any necessary repairs. APR says the damage was repaired after the accident but has been unable to find the repair invoice.

[105] During the investigation meeting, Mr Roberts for the employer maintained that repair costs amounted to around \$20,000 but it transpired that work was never done and there was no proof the work proposed for that cost was a consequence of the accident.

[106] What is more, Mr Roberts confirmed in cross examination that the vehicle had no commercial value which suggest any significant investment would be of doubtful utility any way.

Is Mr Isaac responsible for the shortfall in payment for the bike?

[107] Mr Isaac was asked to hand over a bike belonging to APR and collect payment for it. He acknowledges he was short paid and that it was his fault. However, he also says he immediately tried to correct his mistake including by informing Mr Roberts.

[108] Mr Isaac's evidence is that Mr Roberts said he recovered the money from the purchaser, and it was not until the counterclaim was filed that he became aware that was not the position.

[109] Certainly, it is clear the matter was not raised with Mr Isaac during the employment. A good and fair employer would have done this at the time if it was intended to pursue recovery of the debt.

[110] I decline to make an order requiring Mr Isaac to repay this money.

Did Mr Isaac's duties include cashing up and accounting for all transactions at the end of each day?

[111] Because of the new accounting system that was put in place, I understood Mr Isaac's uncontested evidence to be that daily reconciliation was unnecessary.

[112] It is true there were discrepancies from time to time, but Mr Isaac says the lack of a rigorous process from the employer made it difficult to address.

[113] I accept there may have been a variety of explanations for the discrepancies including wrongdoing by a staff member but there is nothing in the evidence that points directly to Mr Isaac being at fault.

[114] Moreover, wrongdoing by a staff member is only one of the explanations and there were a number of staff, who had access to the system.

[115] Put shortly, none of the evidence pointed to Mr Isaac being at fault.

Were there shortfalls in the cash up performed by Mr Isaac?

[116] I accept the submission made for Mr Isaac that there is simply no evidence to support an allegation of theft as a servant which Mr Roberts now levels at his former employee.

[117] It is the position that this allegation was never made during the employment and, of course, if it were to have any force or effect, it should have been. If there were probative evidence of this wrongdoing, that is a matter for Police, but no effort was made to lay an information at the time, or indeed subsequently.

[118] In the absence of evidence to support this very serious allegation, I decline to take matters any further. It is difficult not to see the whole counterclaim as a visceral response to the personal grievance complaint; that observation seems particularly true of this allegation.

[119] It is true that the fact of the shortfalls were drawn to Mr Isaac's attention during the employment. That is conceded by Mr Isaac, but he goes on to say there was never any robust process taken by APR to address the issue and find out how these shortfalls were occurring. Nor was there any suggestion made that Mr Isaac himself was personally responsible. No liability has been sheeted home to Mr Isaac, in my view.

Did Mr Isaac fail to correctly install the security camera?

[120] The evidence of any alleged failure by Mr Isaac is sketchy indeed. It appears to be contended by APR that Mr Isaac incorrectly installed the security camera to cover up his stealing, but that allegation of stealing is entirely without foundation and I have not been persuaded there is any evidence to support the claim Mr Isaac did not install this device correctly.

Costs for the aborted hearing

[121] I indicated at the aborted hearing In December 2018 that I was minded to award costs against the respondent because it was not ready to proceed with the investigation meeting on the appointed day, having failed to file its evidence in accordance with the timetable I had set, thus inconveniencing me and the applicant.

[122] The respondent sought leave to file submissions on the point and that request was granted, on the footing those submissions would be available to me before the Christmas recess. In fact, the respondent did not file its submissions until 15 February 2019 after reminders from my staff. Forthwith on receipt of the delayed initiating submissions from the respondent, the applicant promptly filed and served their response.

[123] Because of the proximity to the substantive hearing at that point, I deferred my consideration of this issue and determined to address the matter in this substantive determination.

[124] Put simply, the applicant was ready to proceed with the substantive investigation in December 2018 and because the respondent had not complied with my timetable, it was not. It is axiomatic that, in consequence, the applicant suffered loss. Not only was he required to put off until another day the substantive hearing, with the consequent emotional effect of such a deferral, but also he incurred unavoidable actual legal costs which he would not otherwise have incurred, save for the postponement.

[125] I have already made clear that the issue of costs for the postponed hearing is a separate issue from the entitlement to costs from the substantive investigation. The current issue concerns just the entitlement the applicant has to costs for the aborted December 2018 hearing. It must be considered against a backdrop of less than diligent attention to my

directions during the run up to the investigation; it is I think fair to say that most if not all of the Authority's directions were breached by the respondent.

[126] In those circumstances then, the starting point for an award of costs must always be the applicable daily tariff. The aborted hearing took about half a normal hearing day. On that basis then, the starting point is \$2250.

[127] Next I must consider whether there is a basis for that figure to be reduced or increased based on the factors the Authority would normally consider. In the present case it is difficult to see any reason to reduce the figure; the applicant was blameless and ready to proceed while the respondent was neither of those things.

[128] Conversely, I am satisfied the respondent's general failure to comply with timetables set by the Authority is a factor I ought to take into account and I now do so by adding to the starting figure a further \$1000.

[129] In my opinion, costs of \$3250 adequately recompenses Mr Isaac for the deferral of the investigation meeting by making a reasonable contribution to the additional costs he will have incurred because of that delay.

[130] Accordingly, I direct that Adventure Playground Rotorua Ltd is to pay to Mr Isaac the sum of \$3250 as a contribution to costs in respect to the aborted December 2018 hearing.

Conclusion

[131] There is no decision here on the penalties applied for by Mr Isaac. Closing submissions for him proceed on the footing leave should be reserved for further submissions to be filed, once I have decided questions of liability. I so order.

[132] Nor has it been possible for all the calculations required to be made, especially in respect to claims made under the Holidays Act, such that orders can be made. I indicate below where I require further assistance from counsel. This can be either on a collaborative basis, or, should that prove difficult or impossible, by way of memoranda from each party, initiated by the applicant and responded to by APR.

[133] Costs in respect to the substantive investigation are reserved.

[134] I venture to remind counsel that my warrant as a Member of the Authority expires by effluxion of time on 21 August 2019 and accordingly, all outstanding decisions that need to be made concerning this file will need to be before me well in advance of that date. It is self evident that I have no power to make decisions on the matter once my warrant expires.

[135] I now make the following orders whereby APR is to pay to Mr Isaac these amounts:

- Wages for the period from 8 January 2013 to 17 April 2013 in the sum of \$3772.19 gross;
- Wages for the period from 17 April 2013 to 17 September 2013 in the sum of \$6089.55 gross;
- Arrears of wages for the period 19 September 2013 to August 2014 for time worked beyond 37.5 hours per week in the sum of \$3364.89 gross;
- Arrears of wages for the period August 2014 to 10 May 2017 when Mr Isaac was not paid a guaranteed minimum payment of 45 hours per week being the sum of \$3,047.14 gross;
- Arrears of wages for the period August 2014 to 10 May 2017 when Mr Isaac worked beyond the 45 hours per week and was not paid for that work in the sum of \$10,373.97 gross;
- A contribution to Mr Isaac's costs at the aborted December 2018 hearing in the sum of \$3250 net.

[136] In this determination I have made decisions on what Mr Isaac's entitlements are to annual holidays, public holidays, alternative holidays, and the cashing up of holidays but I require the assistance of counsel to calculate Mr Isaac's actual entitlements so I can make orders. As previously indicated, that can be by way of a joint memorandum or an exchange of memoranda.

[137] I have not been persuaded by APR's counterclaim; put shortly, none of their several allegations got close to clearing the evidential hurdle. Nor have I been persuaded that Mr Isaac was unjustifiably dismissed.

James Crichton
Chief of the Employment Relations Authority