

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 488
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: On the papers

Submissions Received: 23 July 2019 and 30 July 2019 from the Applicant
 5 August 2019 from the Respondent

Date of Determination: 19 August 2019

FURTHER DETERMINATION OF THE AUTHORITY

The Purpose of this Determination

[1] There are two different sets of matters to be disposed of in this determination. The first relates to orders concerning holiday pay, alternative holiday entitlement, and public holiday pay and the second relates to costs and penalties.

[2] As to the first, I dealt with the bulk of Mr Isaac's claim against Adventure Playground Rotorua Limited in my substantive decision issued on 25 June 2019. Certain calculations were not able to be made in that determination but are now.

[3] I commended to counsel the notion that they seek to agree the orders that were required; that did not prove possible, but I do have helpful submissions from both counsel concerning the matters in contention.

[4] So far as the latter group of matters is concerned, I have submissions from counsel for the applicant but have yet to receive submissions from counsel for the respondent although they have been promised.

[5] I have made it clear that I finish my role as a Member of the Authority on 21 August 2019 and because of the absence of those submissions from the respondent, I have left the writing of this determination to literally the last minute and I can wait no longer.

[6] I note that the substantive determination has gone on challenge to the Employment Court and any deficit in this determination as consequence of my not having considered the submissions for the respondent, can be dealt with in the Court.

Orders required

[7] As noted above, I have submissions from both parties in respect to this aspect. They do not agree. I have decided that the proper course is to adopt in their entirety the submissions of the applicant. They proceed on the basis of the judgments that I have already made and which I have set out in the substantive determination. If those judgments are mistaken, then that matter can be corrected in the Employment Court as part of the challenge.

[8] I am satisfied that if I revisit any of those judgments now in this brief determination, that is likely to confuse rather than assist.

[9] Accordingly, I am satisfied that I should make the following orders:

- (a) Adventure Playground Rotorua Limited is to pay to Mr Shaun Isaac the following gross amounts:
 - (i) Holiday pay entitlement at termination in the sum of \$8,001.83;
 - (ii) Alternative holiday entitlement at termination in the sum of \$5,102.98;
 - (iii) Holiday pay from last entitlement date to termination at the rate of 8% gross earnings in the sum of \$2,471.19; and
 - (iv) Arrears of time and a half payment on public holidays worked by Mr Isaac in the sum of \$727.50.
- (b) It follows that Adventure Playground Rotorua Limited is to pay to Mr Shaun Isaac the total sum of \$16,303.50 gross.

Penalties

[10] I have already noted that I have no submissions from the respondent in respect to this matter or indeed in respect to costs. I do not think it takes a great deal of imagination to conclude what the respondent might say in relation to the issue of penalties and as I have already explained, I can delay no further in getting this determination out.

[11] I have given careful consideration to the memorandum on penalties from Mr Isaac's counsel. I have concluded that the proper course is not to impose penalties at all. I will explain my reasoning for that decision now.

[12] The imposition of penalties is a discretionary remedy. Of course, the remedy can only be exercised or not, in accordance with principle and in the particular circumstances of this case I have not been persuaded, based on the evidence I heard, that Adventure Playground Rotorua were anything other than careless with the maintenance of proper wage and time records.

[13] The evidence does not suggest any deliberate falsification of records or indeed any impure motive in the failure by the respondent to keep proper records.

[14] After all, the objectives of imposing penalties are usually said to be punishment, deterrence, compensation and the elimination of unfair competition.

[15] In the present case, half of those objectives are not applicable; I am not satisfied that Mr Isaac is entitled to any more compensation than he has already received by dint of having his wages and holiday pay correctly identified and ordered to be paid to him. Moreover, there is no issue that I can discern in relation to unfair competition.

[16] That leaves only the question of punishment and deterrence to pursue. I am not persuaded that Adventure Playground Rotorua Limited needs to be punished by the ordering of penalties to be paid by them to Mr Isaac; they have already sustained a significant financial reverse by dint of their failure to maintain proper records so I am not disposed to use my discretion to punish the respondent further.

[17] Nor do I think there is any particular deterrent value in levying penalties against the respondent in this particular matter.

[18] In summary then, I decline to use my discretion to award penalties in favour of Mr Isaac against Adventure Playground Rotorua Limited.

Costs

[19] Costs are sought by Mr Isaac in the sum of \$16,000 being \$8,000 in accordance with the daily tariff that usually applies in this Authority and an uplift of a like amount to reflect the behaviour of the respondent.

[20] The daily tariff component to that claim is I consider uncontroversial. The daily tariff is the starting point. The number of days of hearing have been correctly counted and the appropriate daily rate applied in each case.

[21] The only broad issue that I think needs to be addressed in relation to the claim for costs is the question whether the applicant was the successful party. If the applicant was the successful party, then the normal rule of costs following the event would apply.

[22] But, as counsel for Mr Isaac correctly points out, there is an argument in the present case for each party to claim a share of the spoils; Mr Isaac was unsuccessful in his claim for constructive dismissal so the respondent can properly say that they have successfully resisted part of Mr Isaac's claim.

[23] However, I accept the submissions for Mr Isaac to the effect that the substance of his claim has been successful and the central elements of it (the wages claim) were entirely successful. Moreover, Mr Isaac was completely successful in resisting the counterclaims brought by the respondent. So, I am satisfied that Mr Isaac is entitled to costs.

[24] I am also satisfied that Mr Isaac is entitled to an uplift in those costs. I made it clear to the parties at the aborted hearing in December 2018 that the failure of the respondent to be ready to proceed, having not filed any evidence on the timetable I set, would sound in costs.

[25] I agree with Mr Isaac's counsel that the respondent has been unhelpful and obstructive, and this has increased the costs borne by Mr Isaac.

[26] A particular example of this is the absolute failure of the respondent to provide wage and time records. Those records were requested on four separate occasions and it was not until I demanded that the records be produced that some records were finally made available.

[27] By virtue of the fact that the applicant had to in effect recalculate each and every hour of his work life with the respondent, he was put to considerable cost and I must say that I am indebted to Mr Isaac's counsel for the care that they have applied to the exercise of producing that information.

[28] I think it also fair to say that the case was complex and difficult both to argue and to decide and that should be reflected in a costs award.

[29] Accordingly, I award the costs requested by Mr Isaac and direct that Adventure Playground Rotorua Limited is to pay Mr Isaac the sum of \$16,000 as a contribution to his costs.

James Crichton
Chief of the Employment Relations Authority