

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 487
3107492

BETWEEN	IAN ROBERTSON Applicant
AND	STEVRYN HOLDINGS LIMITED First Respondent
AND	MALCOLM MACDONALD Second Respondent
AND	DARRYN MACDONALD Third Respondent

Member of Authority: Helen Doyle

Representatives: Amy Kennerley, counsel for the Applicant
No appearance by the Respondents

Supplementary memorandum received: 27 October 2021

Date of Determination: 4 November 2021

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 13 October 2021 the Authority ordered Stevryn Holdings Limited (Stevryn) to pay Ian Robertson the sum of \$53,093.75 gross for unpaid wages and \$9,952.04 for reimbursement of fuel related expenses. The Authority ordered penalties payable by Stevryn for a breach of the employment agreement and by Malcolm and Darryn MacDonald for aiding and abetting the breach. The Authority reserved the issues of public holiday entitlements, holiday pay and costs.¹

¹ *Robertson v Stevryn Holdings Limited and Others* 2021 NZERA 452.

[2] The Authority has now received a further supplementary memorandum from Ms Kennerley regarding public holidays and costs.

[3] This determination will deal with public holiday entitlements, holiday pay and costs.

Calculation of public holiday entitlements

[4] The Authority asked in its first determination for calculations of average daily pay for public holidays based on the formula in section 9A(2) of the Holidays Act 2003.

[5] Ms Kennerley has now provided those calculations and assessed a total amount owing for public holidays of \$2,885.67 gross.

Christmas Day 2018	\$162.50
Boxing Day 2018	\$162.50
New Year's Day 2019	\$162.50
Day after New Year's Day 2019	\$162.50
Waitangi Day 2019	\$173.66
Good Friday 2019	\$222.79
Easter Monday 2019	\$222.79
Queen's Birthday 2019	\$174.17
Labour Day 2019	\$237.75
Canterbury Anniversary Day 2019	\$239.60
Christmas Day 2019	\$239.32
Boxing Day 2019	\$239.32
New Year's Day 2020	\$241.01
Day after New Year's Day 2020	\$241.01
Waitangi Day 2020	\$243.57

[6] There are two matters arising from the table. The first is that the Authority arrived at a slightly different amount when the above figures are added up of \$3,124.99.

[7] The second is that when the Authority was calculating holiday pay the records from Mr Robertson's log books show that he had worked two of the public holidays, Queen's Birthday 2019 and New Year's Day 2020. The Authority has already calculated payment for the hours worked for those two days in its original determination but Mr Robertson is entitled to be paid time and a half for the two public holidays that he worked and is further entitled to two alternative days.

[8] Those matters aside the Authority accepts the calculations for the public holidays that would otherwise have been working days for Mr Robertson under s 9A of the Holidays Act 2003 as provided by Ms Kennerley.

Payment for working on statutory holidays

[9] One of the two public holidays that Mr Robertson worked was Queen's Birthday 2019. It fell on 3 June 2019 and Mr Robertson worked 10.5 hours that day. His hourly rate was \$25. At time and a half he should have received \$393.75 gross. An additional \$131.25 is owing for that day.

[10] The other public holiday worked was on New Year's Day 2020. Mr Robertson worked 11 hours. At time and a half he should have received \$412.50. An additional \$137.50 is owing for that day.

Payment for alternative days

[11] Section 60 of the Holidays Act 2003 provides that payment for alternative days must be paid at not less than the employee's relevant daily pay or average daily pay for the day which is taken as the alternative holiday.

[12] Mr Robertson's pay varied and it is not possible to determine his relevant daily pay under s 9(1) of the Holiday Act 2003. A calculation under s 9A of average daily pay is appropriate. This requires that the Authority divide the gross earnings for the 52 calendar weeks before the last pay period by the whole or part days during which the employee earned the gross earnings including days on which the employee was on paid leave or paid holiday.

[13] The last day of employment was 14 February 2021. The gross earnings for the 52 weeks before the last pay period are \$62,634.31. This includes the amounts for public holidays that were not worked but should have been paid. There were no paid holidays or leave during the employment.

[14] I have divided \$62,634.31 by 251 being the number of part and whole days worked by Mr Robertson including public holidays that would otherwise have been working days. A figure of \$249.54 is arrived at for payment for each of the alternative days.

[15] Mr Robertson is entitled the following payments for public holiday entitlements:

- (a) Payment for public holidays that would otherwise have been working days being \$3,124.99 less \$174.17 and \$241.01 which is the gross sum of \$2709.81 gross.²
- (b) Payment at time and a half for working on Queens's birthday 2019 and New Years' 2020 in the sum of \$268.75 gross.
- (c) Two alternative days at \$249.53 for each day in the sum of \$499.07 gross.

Holiday Pay

Anniversary date

[16] It is necessary to ascertain a commencement date for Mr Robertson in order to calculate holiday pay. The Authority is unable to be exact about this. There was no employment agreement. Although the Authority directed Stevryn to provide wage and time and holiday and leave records these were not provided. Work was undertaken by Mr Robertson from at least December 2018 and perhaps earlier but no wages were paid until May 2019. Log book entries to support wage claims were only available from 21 December 2018. In all the circumstances fixing a commencement date of employment of 3 December 2018 is appropriate.

Calculation of annual holiday pay

[17] When the employment relationship ended after 14 February 2020 Mr Robertson had an entitlement to annual leave. Mr Robertson is therefore entitled to payment of his annual leave

² Calculations for Queens Birthday and New Years' Day dealt with separately as worked.

entitlement. There is no evidence that he took any paid leave during his employment. Section 24(2)(a) and (b) of the Holidays Act 2003 provides that if there is an entitlement to holidays when the employment ends annual holiday pay is to be paid at a rate based on the greater of ordinary weekly pay at the end of employment, or average weekly earnings during the 12 months immediately before the end of the last pay period before the end of employment.

[18] Mr Robertson's ordinary weekly pay at the end of his employment was \$1,175 gross. His weekly earnings, which include payments for public holiday entitlements averaged out for 12 months immediately before the last pay period, are \$1204.50. The weekly earnings averaged out therefore are the greater rate of the two rates. Mr Robertson is entitled to payment for his annual leave entitlement at the rate of \$1204.50 multiplied by four weeks which is \$4,818 gross.

[19] Mr Robertson is additionally entitled under s 25 of the Holidays Act to 8% of his gross earning since 3 December 2019 when he last became entitled to annual holidays. His gross earnings between 3 December 2019 and 14 February 2020 are \$14,073.22 which amount includes payment for alternative days. \$14,073.22 multiplied by 8% is \$1,125.85.

[20] Holiday pay is therefore due and owing to Mr Robertson. \$4,818 and \$1,125.85 added together are the sum of \$5,904.05 gross and that is the holiday pay owing.

Orders

[21] Stevryn Holdings Limited is ordered to pay to Ian Robertson, within 28 days of the date of this determination, the following amounts:

- (a) The sum of \$2,709.81 gross being payment for public holidays that would otherwise have been working days.
- (b) The sum of \$268.75 gross being payment at time and a half for working on two public holidays.
- (c) The sum of \$499.07 gross being payment for two alternative days.
- (d) The sum of \$5,904.05 gross being holiday pay.

Costs

[22] Ms Kennerley seeks costs of \$3,375 being the daily tariff for a half day meeting approximately with an uplift of 50%.

[23] My minute book records the meeting took about an hour and a half and an appropriate starting point for an assessment of costs is one quarter of the daily tariff of \$4,500 in the sum of \$1125.

[24] Ms Kennerley submits that there should be an uplift based on the lack of engagement by the respondents and failure to attend at mediation.

[25] The respondents only engaged to a minimal extent, did not provide a statement in reply in the usual form, statements of evidence, or attend the investigation meeting. It is only to a limited extent that that contributed to any increase in costs. I accept that the failure to provide records caused additional work and cost in calculating unpaid wages and other minimum entitlements over a lengthy period of employment with only limited assistance from the Inland Revenue Department records. For that reason I increase the starting point by \$800 to reflect that additional cost.

[26] I am not persuaded that the failure by the respondent to attend at two telephone mediations should result in an increase to costs in this particular matter. I weigh, with that, that the applicant was not successful in his claim for unjustified constructive dismissal. That claim, whilst it had some legal complexities, did not require significant additional hearing time as the facts were essentially the same as those for the unpaid wages claim in the unusual circumstances of this matter. Remedies did need to be traversed but I make no further adjustment to costs.

[27] A total cost award of \$1,925 is appropriate together with reimbursement of the filing fee of \$71.56.

[28] I have considered how the costs should be applied between the three respondents.

[29] The main claims were against Stevryn and the company should be liable for 80% of the costs. The claims against Malcolm MacDonald and Darryn MacDonald were limited to a penalty claim for aiding and abetting. Those claims were successful and it is appropriate that they are liable to pay 10% of the costs awarded.

[30] Stevryn Holdings Limited is ordered to pay to Ian Robertson the sum of \$1,540 being costs together with the sum of \$71.56 being reimbursement of the filing fee.

[31] Malcolm MacDonald is ordered to pay to Ian Robertson the sum of \$192.50 being costs.

[32] Darryn MacDonald is ordered to pay to Ian Robertson the sum of \$192.50 being costs.

Helen Doyle
Member of the Employment Relations Authority