

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 544
3141781

BETWEEN	STEVEN RUSTON Applicant
AND	AJW CONTRACTING AND EARTHWORKS LIMITED First Respondent
AND	WILLIAM SAMUEL LEWIS OSWALD Second Respondent

Member of Authority:	Philip Cheyne
Representatives:	Peter McRae, counsel for the Applicant William Oswald, advocate for the First Respondent and Second Respondent in person
Investigation Meeting:	26 November 2021 at Nelson
Date of Determination:	6 December 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Steven Ruston worked for AJW Contracting and Earthworks Limited from about 2018 until March 2021. Mr Ruston says he has not been paid holiday pay at the termination of his employment. The claim is for arrears of holiday pay, interest, a penalty for breach of the Holidays Act 2003 and costs.

[2] William Oswald is the director of AJW Contracting and Earthworks Limited. The claim against Mr Oswald is for him to be personally liable for the arrears and penalty, to the extent of any default by the company to meet such orders.

[3] Neither the company nor Mr Oswald lodged a statement in reply, although there was a later email. Arrangements for a case management conference were made known to Mr Oswald and he participated. I formed the view that mediation would not contribute constructively to resolving the problem, so I set in place arrangements for an investigation meeting. The respondents were directed to lodge written witness statements by 15 November 2021, but did not.

[4] Mr Oswald appeared at the investigation meeting. Despite the respondents' failure to properly engage, I allowed Mr Oswald to participate in the investigation meeting. We had to move the investigation meeting to a nearby venue. Mr Oswald sought an adjournment, as he had not received written advice of the changed location. I declined an adjournment. Mr Oswald told me that only he was appearing and I had explained the reason for the venue change and its location to Mr Oswald. The meeting proceeded at the new venue and Mr Oswald participated.

[5] By consent, the proceedings were amended to show Mr Oswald's full name as the second respondent.

What happened?

[6] There are no relevant factual disputes.

[7] Mr Oswald dismissed Mr Ruston, but the present claim is not a personal grievance claim and the circumstances of the employment and dismissal do not need to be considered. The dismissal letter, received on or about 28 March 2021, included:

When the finances are available you will be paid out your annual leave/holiday that you are owed.

[8] A payslip that accompanied payment of some wages before the dismissal showed annual leave of nearly 200 hours was due.

[9] At the investigation meeting, Mr McRae produced a computer payslip that had been received shortly beforehand. Mr Oswald confirmed it was prepared for his company. It

shows holiday pay owing to Mr Ruston of \$4,616.00 (gross) or \$2,763.80 (net). No payment has yet been received by Mr Ruston. Mr Oswald rang his accountant who explained the calculation process. The claim was amended, without objection, to reflect the updated information shown in the payslip for the period 08/11/2021 – 15/11/2021.

Arrears of holiday pay

[10] To comply with the Holidays Act 2003, an employer must pay an employee holiday pay in the pay that relates to the employee's final period of employment.¹ Mr Ruston's employment ended in March 2021. Mr Ruston's attempts to obtain payment, with the assistance of Community Law, were not successful.

[11] I find that holiday pay of \$4,616.00 (gross) or \$2,763.80 (net) is owed to Mr Ruston. There will be an order requiring payment to Mr Ruston of the net amount due (\$2,763.80) without deduction, in line with the payslip produced in evidence. I make the assumption that the company will abide by obligations to remit PAYE, Kiwisaver and other deductions to the relevant entities.

[12] I have power to order the payment of arrears by instalments, but only if the financial position of the employer requires it.² There is some evidence from Mr Ruston to indicate that there were issues with the company's financial position at several points during his employment. However, Mr Oswald produced no evidence about the company's financial position other than to say that the company would start paying Mr Ruston arrears at \$100.00 per week, given its financial circumstances.

[13] Mr Oswald is still annoyed with Mr Ruston over the matters that resulted in the dismissal. Mr Oswald told me that those matters were the reason why the company did not pay Mr Ruston his holiday pay. While Mr Oswald threatened Mr Ruston with "Court" several times during the investigation meeting, nothing was raised to show there might be a set-off or counter-claim.

[14] The company has not shown that its financial position requires payment of the arrears by instalments. Its failure to pay holiday pay is because of the view Mr Oswald formed about

¹ Holidays Act 2003 s 27(2).

² Employment Relations Act 2000 s 131(1A).

Mr Ruston's conduct ahead of the dismissal. There is no basis to order payment by instalments.

Penalty for breach of Holidays Act 2003

[15] I find that the company continues to be in breach of s 27 of the Holidays Act 2003.

[16] An employer who fails to comply with specified provisions of the Holidays Act 2003 is liable, if a company, to a penalty of up to \$20,000.00 under s 75 of the Holidays Act 2003. The specified provisions include s 27 of the Act.³ I find that the company is liable to a penalty of up to \$20,000.00.

[17] In determining an appropriate penalty, I am required to have regard to all relevant matters, including those set out in s 133A of the Employment Relations Act 2000.⁴

[18] The breach is with respect to employment standards, as it relates to minimum entitlements and payment under the Holidays Act 2000. A specific purpose of the Holidays Act 2003 is to require employers to pay employees at the end of their employment for annual holiday entitlements not taken or paid out.⁵ A penalty must be set to promote the effective enforcement of employment standards.

[19] In light of Mr Oswald's evidence, I find that the breach was intentional. The company has continued to refuse to pay the holiday pay to Mr Ruston. It has had the advantage of retaining that money, while Mr Ruston has suffered the loss of not having use of money he should have been paid. The company has conducted itself as if it had a legal right to withhold payment based on Mr Oswald's views about the dismissal. Mr Ruston has suffered the frustration of needing to commence and continue these proceedings to enforce his undisputable legal rights. The effects for Mr Ruston are significant.

[20] The company has done nothing by way of reparation, restitution or steps to mitigate the adverse effects of the breach. It continues to be in breach. A penalty is required to deter the company from future breaches, and to deter other employers from similar unlawful conduct.

³ Holidays Act 2003 s 75(2)(a).

⁴ See also *Borsboom v Preet Pvt Limited* [2016] NZEmpC 143 and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

⁵ Holidays Act 2003 s 15(c).

[21] These factors cause me to conclude that a penalty should be set at 40% of the maximum to mark the seriousness of the breach, or \$8,000.00.

[22] Mr Ruston was not in a position of vulnerability, such as might exist for employees who require work visas, do not speak English as a first language, are remote from support networks or have limited ability to access advice and assistance. There is no reason to increase the penalty to account for vulnerability factors.

[23] The company and Mr Oswald have not previously been found by the Authority or the court in proceedings to have engaged in similar conduct. The company is entitled to a reduction of 50% in the level of penalty otherwise applicable in recognition of this fact. The quantum of penalty reduces to \$4,000.00.

[24] The company has not established any inability to meet a penalty. A penalty at \$4,000.00 is not disproportionate to the amount of holiday pay withheld and the harm caused. It is not inconsistent with the level of penalties imposed in similar cases.⁶ I fix the penalty at \$4,000.00.

[25] Mr Ruston seeks an order that at least part of the penalty is payable to him. It is appropriate to order part of the penalty to be paid to Mr Ruston. While there will be an order for prompt payment of the arrears and interest, Mr Ruston has no other remedy for the serious breach of his right to receive holiday pay at the termination of the employment. There will be an order for half the penalty be paid to Mr Ruston.

Is Mr Oswald personally liable?

[26] If there has been a default in payment of money due to an employee, the default is due to a breach of employment standards and the person is a person involved within s 142W of the Employment Relations Act 2000, an employee can recover money payable from a person who is not the employer.

[27] Mr Oswald, although not the employer, is a person involved in the company's breach of its holiday pay obligations.⁷ As a director, he is an officer of the company. He was directly and knowingly concerned in the breach. It occurred at his direction. Arrears of holiday pay

⁶ For example, see *Nicklin v J K J Oborn Limited* [2020] NZERA 108.

⁷ For the purposes of s 142W of the Employment Relations Act 2000.

may be recovered from him, with the Authority's prior leave, to the extent that the company is unable to pay the arrears of holiday pay.

[28] At this point, I cannot say that AJW Contracting and Earthworks Limited is unable to pay the holiday pay due to Mr Ruston. Indeed, the penalty is fixed on the basis that the company is able but has been unwilling to pay the holiday pay. I will reserve this issue for further consideration to give the company an opportunity to pay the holiday pay and interest. If it does not, it may be proper to infer continuing non-payment is caused by an inability to pay, so as to entitle Mr Ruston to recover arrears from Mr Oswald personally.

[29] In the statement of problem, an order was sought to hold Mr Oswald personally liable for any penalty against the company. A person involved in a breach is liable for a penalty, imposed under the Employment Relations Act 2000, but only on an application by a Labour Inspector.⁸ The present application is by Mr Ruston, so s 142X of the Act does not apply. The claim was not presented as a claim under s 134(2) of the Employment Relations Act 2000. Counsel withdrew the claim for Mr Oswald to be personally liable for a penalty fixed against the company, so it is not necessary to determine the point.

Summary, costs and other orders

[30] The holiday pay should have been paid in March 2021. There is no dispute about liability or quantum. Payment without further delay is appropriate.

[31] AJW Contracting and Earthworks Limited is to pay Steven Ruston holiday pay of \$2,763.80 (without deduction) by no later than Monday 13 December 2021.

[32] Holiday pay should have been paid on 28 March 2021. Based on payment on 13 December 2021, AJW Contracting and Earthworks Limited is to pay Steven Ruston interest of \$20.18, by no later than Monday 13 December 2021.

[33] The claim against William Oswald to be liable under s 142W of the Employment Relations Act 2000 is reserved until 14 December 2021. Mr Ruston may then pursue this claim further by notice to the Authority on 14 December 2021, if AJW Contracting and Earthworks Limited has not paid him holiday pay of \$2,763.80 (without deduction), together with interest of \$20.18.

⁸ Employment Relations Act 2000 s 142X(2).

[34] AJW Contracting and Earthworks Limited is to pay a penalty of \$4,000.00 in total as follows:

(a) \$2,000.00 paid into a Crown Bank Account by no later than 3 January 2022;
and

(b) \$2,000.00 paid to Steven Ruston by no later than 3 January 2022.

[35] There is a claim for costs. Mr Ruston was represented by Nelson Bays Community Law. In *Innovative Landscapers (2015) Ltd v Popkin*,⁹ the Employment Court confirmed that for costs purposes in the court, a party who is represented by Community Law is in an analogous situation to a party who uses in house legal services. The same principle applies in the Authority.¹⁰ Mr McRae sought costs on a daily tariff basis, but at a quarter of the first day rate (\$1,125.00) due to the brevity of the investigation meeting. I agree that costs on that basis would be appropriate, as Mr Ruston has been successful. There will also be an order to cover the lodgement fee of \$71.56.

[36] AJW Contracting and Earthworks Limited is to pay Steven Ruston costs of \$1,196.56 by no later than 3 January 2022. Mr Ruston is to pay these costs to Nelson Bays Community Law, except that he may retain \$71.56 if he had personally paid the lodgement fee.

Philip Cheyne
Member of the Employment Relations Authority

⁹ *Innovative Landscapers (2015) Ltd v Popkin* [2020] NZEmpC 96.

¹⁰ *Popkin v Innovative Landscapers (2015) Ltd* [2020] NZERA 374.