

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 208  
3148263

BETWEEN

DARRYL DUNN  
Applicant

AND

THE MINISTRY OF FOREIGN  
AFFAIRS AND TRADE  
Respondent

Member of Authority: Sarah Kennedy

Representatives: Darryl Dunn for the Applicant  
David Traylor, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 26 March 2022 from the Applicant  
22 April 2022 from the Respondent

Date of Determination: 20 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Darryl Dunn was reimbursed by his former employer, the Ministry of Foreign Affairs and Trade (the Ministry) for a salary underpayment amounting to \$19,071.94. Mr Dunn is seeking an order from the Authority for a payment of interest on that amount for the period.

[2] In response the Ministry says the Authority can only do what it is empowered to do by the provisions of the Employment Relations Act 2000 (and the associated employment legislation). It says there is no provision that would permit the Authority to award interest on an amount in circumstances where the Authority has not made a determination or given judgment for an employee in an action to recover holiday pay. It is on this basis that the

Ministry says there is no jurisdiction for the Authority to be able to remedy the employment relationship problem set out by Mr Dunn.

### **The Authority's investigation**

[3] At the case management calls with the parties, it was agreed that the jurisdiction issue could be dealt with as a preliminary matter and heard on the papers because it would need to be resolved in order for Mr Dunn's claim to be heard. A written statement and submissions were lodged from Mr Dunn and the Ministry filed written submissions. Mr Dunn further submitted that in the alternative, he was seeking confirmation that the Ministry owes the interest amount to him and is obliged to pay it as a fair and reasonable employer.

[4] The Authority also sought a copy of the individual employment agreement from the parties.

### **The Issues**

[5] The issues identified for investigation and determination are:

- (a) Whether the Authority has jurisdiction to award the interest payment sought by Mr Dunn?
- (b) Whether the Authority can determine that the Ministry owes Mr Dunn a payment of interest as a fair and reasonable employer and, if yes, can the Authority also determine that the Ministry is obliged to pay that amount to Mr Dunn.

### **Background**

[6] On or about 26 March 2021, Mr Dunn was notified that the Ministry, on becoming aware of potential issues regarding the way its payroll system calculated employment entitlements pursuant to the Holidays Act 2003 (HA) for the period July 2010 to December 2020, had identified current and former employees who had been underpaid and corrected the errors identified and made remediation payments.

[7] Mr Dunn had been underpaid his entitlements under the HA prior to 2013 when he left his employment with the Ministry. Accordingly, the Ministry corresponded with him, including confirming the total amount owed and advised him he would not receive interest on the sum.

[8] Mr Dunn wrote back and invited the Ministry to reconsider the issue of interest on his remediation payment. The remediation payment was made to Mr Dunn and the Ministry advised him in writing that an interest payment would not be made, and none of the affected employees were receiving such payments.

### **Analysis**

[9] The Ministry has set out and described the statutory framework in this way:

The Authority has the express statutory power to exercise its discretion to award interest in only certain limited circumstances:

- (a) In any matter involving the recovery of money (Schedule 2, clause 11 of the Employment Relations Act 2000 (the Act));
- (b) Where the Authority gives judgment for an employee in an action to recover holiday pay or leave pay (s 84(1)(a) of the Holidays Act 2003 (the HA)); and
- (c) Where the Authority makes a determination under s 226 of the Act (relating to objections to Demand Notices served by Labour Inspectors) in favour of the employee (s 84(1)(b) of the HA).

None of those circumstances are triggered in the present case:

- (d) The applicant has no claim involving the recovery of any money;
- (e) The applicant has no claim for the recovery of holiday or leave pay and, therefore, the Authority has not given (and cannot give) judgment in respect of such claim; and
- (f) A Labour Inspector has not issued a Demand Notice upon which an objection could be lodged or determined.

[10] The Ministry's position is that having paid Mr Dunn the remediation payment, the only statutory provisions that are engaged are those set out above and none are triggered in Mr Dunn's circumstances, because the employer addressed the shortfall.

[11] Having considered the submissions and the relevant law, I am satisfied that the Ministry is correct that the Authority lacks jurisdiction to address Mr Dunn's claim in circumstances where the Ministry has remediated Mr Dunn.

[12] For completeness, I have also reviewed the individual employment agreement provided by Mr Dunn and confirmed there is no provision requiring the employer to pay interest on any arrears owed to an employee.

[13] To the extent that a personal grievance could be disclosed by the claim, taking into account the ninety-day time limit in the Act for submitting a personal grievance,<sup>1</sup> any potential grievance was raised outside of that time frame and well after the employment relationship had ended.

[14] Taking all of the above into account, the Authority can find no statutory provision or any other obligation on the employer to pay interest on the holiday pay arrears as sought by the applicant.

[15] In these circumstances the Applicant's claim cannot succeed.

### **Costs**

[16] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, the Ministry may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Dunn would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[17] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>2</sup>

**Sarah Kennedy**  
**Member of the Employment Relations Authority**

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<sup>1</sup> Employment Relations Act, 2000, s 114 (3).

<sup>2</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)