

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 51  
3109172

BETWEEN MATTHEW KENNETH BRIAN  
DOBSON  
Applicant

AND VXJ HOLDINGS LIMITED  
First Respondent

AND CENTRAL CITY TRAVELLERS  
MARKET LIMITED  
Second Respondent

Member of Authority: Helen Doyle

Representatives: Peter Maciaszek and Alex Margaritis, counsel for the  
Applicant  
Peter Foster and Jeff Cowles, advocates for the Respondents

Submissions Received: 19 January, 31 January, and 22 February 2022 from the  
Applicant  
27 January, 2 February, and 23 February 2022 from the  
Respondent

Date of Determination: 24 February 2022

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**DETERMINATION OF THE AUTHORITY AS TO  
COSTS AND HOLIDAY PAY**

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**Employment Relationship Problem**

[1] The Authority found in its substantive determination dated 16 December 2021 that the applicant was an employee of the second respondent and was entitled to holiday pay. It did

not uphold the applicant's claim for unjustified constructive dismissal and made no orders against the first respondent.<sup>1</sup>

[2] The Authority reserved the issue of costs and asked that the applicant provide a further calculation for holiday pay in accordance with s 23 of the Holidays Act 2003. The Authority indicated that it would order interest on any holiday pay award as claimed in the statement of problem.

[3] Mr Margaritis provided submissions as to costs and a calculation for holiday pay on behalf of the applicant.

[4] Mr Foster and Mr Cowles on behalf of the respondent provided submissions as to costs and holiday pay.

### **The applicant's submissions**

[5] Mr Margaritis submits the matter was set down for an investigation meeting on 1 October 2021 but adjourned early in the afternoon because Mr Foster had a commitment. The investigation meeting then concluded on the morning of 6 October 2021.

[6] He submits that the applicant was successful in two of his claims that he was an employee and was owed holiday pay. Further that the key aspect of the claim that the applicant was an employee of the second respondent occupied most of the time at the Authority investigation meeting.

[7] Mr Margaritis submits that the factual nature of the matter was less complicated than submitted by the respondents who provided unnecessarily complicated and voluminous documentation with extensive email narratives and submissions.

[8] He submits that the applicant is entitled to costs on the basis of one day's tariff of \$4,500 and disbursements in the sum of \$122.41.

[9] The holiday pay is to be calculated in accordance with s 23 of the Holidays Act 2003 as 8% of gross earnings for a period of employment less than 12 months. The applicant's income from the second respondent had only been reported to Inland Revenue Department for the first month of his employment in March 2018. Mr Margaritis set out that additional gross

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<sup>1</sup> *Dobson v VXJ Holdings Limited and Central City Travellers Market Limited* [2021] NZERA 565.

earnings for the period of employment from 1 April to 6 August 2018 come to a total of \$16,428.67 which sum is to be added to the gross earnings for March 2018 of \$3,700. That would be a total for the calculation of holiday pay of \$20,128.67.

[10] Mr Cowles in his submissions raised an issue about how the holiday pay had been calculated from the net sums paid to the applicant between 1 April and 6 August 2018. The Authority asked Mr Margaritis for clarification.

[11] The Authority was advised by another lawyer at the firm, Samuel Lester, that he calculated from the bank statements the net payments received by the applicant between 1 April and 6 August 2018 inclusive were \$13,606.58 net. Mr Lester then converted that net amount to a gross figure using the Inland Revenue calculator to \$15,812.34. To that figure there needs to be added the gross earnings in March 2018. Mr Lester arrived at a different gross figure for the period between April and August 2018 to that arrived at by Mr Margaritis. The Authority will check the figures in assessing holiday pay owing.

#### *The respondent's submissions*

[12] Mr Foster and Mr Cowles submissions on costs refer to a measure of dissatisfaction with the decision and with the applicant. They maintain that the relationship was not in the nature of employment. The focus for the Authority at this stage is on resolving the issue of costs having found the relationship was one of employment.

#### **The Issues**

[13] The Authority needs to determine the following issues:

- (a) What holiday pay is owed?
- (b) Should the Authority award interest on holiday pay and, if so, from what date?
- (c) Is the applicant entitled to an award of costs and if so in what amount.

#### **What holiday pay is owed?**

[14] The Authority has calculated the net amounts and agrees with the figures provided by Mr Lester and the conversion of that net total to \$15,812.34 gross. The gross earnings of \$3,700 for March 2018 need to be added to \$15,812.34 gross to arrive at total gross earnings of

\$19,512.34. Mr Lester's total figure was slightly lower as he was averaging payments for the month of March. The Authority is in receipt of the applicant's actual gross income for March 2018 and has used that.

[15] Mr Cowles and Mr Foster raise issues about the calculation of gross earnings in the absence of PAYE returns having been lodged. The Authority has found the applicant was an employee. The second respondent is obliged to pay holiday pay to the applicant under the Holidays Act 2003. It is necessary to calculate gross earnings to arrive at an amount for payment of holiday pay.

[16] The applicant is entitled to 8% of \$19,512.34 which is \$1560.99 gross.

[17] I order Central City Travellers Market Limited to pay to Matthew Dobson the sum of \$1,560.99 gross being holiday pay within 28 days of the date of this determination.

### **Interest**

[18] The Authority may order interest payable under clause 11 of the second schedule to the Employment Relations Act 2000 (the Act) on a monetary award in accordance with the Interest on Money Claims Act 2016.

[19] When employment comes to an end an employer is obliged to pay holiday pay in the pay that relates to the employee's final period of employment under s 27(2) of the Holidays Act 2003. The final period of employment was in early August 2018.

[20] After the relationship ended there was some dispute about its nature. I have allowed a brief period to take that into account. I consider it appropriate to calculate interest from 3 September 2018 to 24 February 2022 on \$1,560.99 gross. Using the civil debt interest calculator, the amount of interest is \$129.62.

[21] I order Central City Travellers Market Limited to pay to Matthew Dobson the sum of \$129.62 being interest on the holiday pay within 28 days of the date of this determination.

## Costs

[22] The Authority has the power to award costs under clause 15 of schedule 2 of the Act. There are well established principles set out by the full Court of the Employment Court in *PBO Limited (formerly Rush Security) v Da Cruz*, with respect to costs in the Authority.<sup>2</sup> Costs generally follow the event. The applicant was successful in his claims that he was an employee and for holiday pay although not in his claim that he was unjustifiably constructively dismissed. There is no good reason not to consider an award of costs in the applicant's favour in the circumstances of this case. The discretion as to costs is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or an expression of disapproval.

[23] There is a daily tariff against which costs are frequently judged. At the current time the daily tariff is \$4,500 for the first day of the matter.

[24] It is appropriate to start with the daily tariff of \$4,500 as the meeting took place over two days but they were not full days. I will then consider whether any adjustment is required to the daily tariff. I accept the submission from Mr Margaritis that the key aspect of the claim was whether the applicant was an employee of the second respondent. This issue was strongly disputed, and a large amount of documentation, submissions and emails were provided on behalf of the second respondent. In the circumstances of this case the claim for constructive dismissal did not extend the investigation by any significant degree to justify a downward adjustment to costs.

[25] Although there were no orders made against the first respondent it was clear to the parties and the Authority before the investigation meeting that the focus was on the relationship between the applicant and the second respondent. The relationship between the applicant and the first respondent was simply part of the factual matrix. Mr Foster is the sole director of both the first and second respondents. No issue of costs arises there.

[26] There is to be an award of costs in favour of the applicant of \$4,500.

[27] The sum of \$122.41 is additionally claimed for disbursements. This is made up of the filing fee of \$71.56 and a Personal Property Securities Register search, and title searches and a file storage fee. I cannot discount in the rather unusual circumstances of this matter that these

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<sup>2</sup> *PBO Limited (formerly Rush Security) v Da Cruz* [2005] ERNZ 808 at [44].

types of searches assisted to unravel and understand the relationship the applicant had with the second respondent. I am prepared to allow the disbursements for those matters. I am not prepared to allow the file storage fee disbursement of \$6.25. Disbursements are payable in the sum of \$116.16.

[28] I order Central City Travellers Market Limited to pay to Matthew Dobson costs in the sum of \$4,500 and disbursements in the sum of \$116.16 within 28 days of this determination.

Helen Doyle  
Member of the Employment Relations Authority