

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 528  
5342305

BETWEEN	DELWYN CANN Applicant
AND	FANDAM FITNESS LIMITED Respondent

Member of Authority: R A Monaghan

Representatives: T Cann, advocate for applicant  
K Fandam, advocate for respondent

Investigation meeting: 9 December 2011

Determination: 13 December 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Delywn Cann says her former employer Fandam Fitness Limited (FFL) owes her unpaid holiday pay, statutory holiday pay and sick leave.

[2] The parties attended mediation after the employment relationship problem was lodged in the Authority. A partial settlement was achieved, and the record of settlement was signed by a mediator under s 149 of the Employment Relations Act 2000. The above claims for holiday pay and sick leave were among the matters remaining unresolved and were referred back to the Authority accordingly.

[3] Mrs Cann now says further that clause 6 of the record of settlement has been breached. Clause 6 read:

*6. Delwyn Ruth Cann believes that Kiwi Saver Employer Contributions have not been made by Fandam Fitness Limited to the IRD. This relates to the period from September 2008 to December 2010. Kathy Fandam shall supply Delwyn Ruth Cann with details concerning which payments have been made. This information shall be supplied within one month of the date hereof.*

[4] The information was not supplied. Mrs Cann seeks a penalty for the breach.

[5] Finally clauses 2 and 3 of the record of settlement contained certain provisions for the payment of monies, in respect of which defaults occurred on 24 and 30 November 2011 respectively. Kathy Fandam, a director and shareholder of FFL, advised that the defaults occurred through oversight, and undertook to address the matter at the end of the investigation meeting. Any claim in that respect is adjourned to allow Mrs Fandam to do so.

### **Claims for holiday pay, statutory holiday pay and sick leave**

#### 1. Holiday pay

[6] Mrs Cann was paid holiday pay calculated on the basis that she worked 30 hours per week. The figure of 30 hours week was entered into FFL's MYOB payroll system accordingly for the purposes of calculating her annual leave payments. However the hours of work provision in the parties' employment agreement specified that Mrs Cann's hours of work were '+-30 – 34' per week from Monday to Saturday. Further it was common ground that Mrs Cann's actual weekly hours of work averaged in the high 30s.

[7] This accounts for the difference between the amounts Mrs Cann was paid and the amounts she says are owed. She calculated the latter with reference to her total gross earnings. Her claim covers the period from the commencement of employment on 8 September 2008 to its termination on 15 December 2010. A review of the figures, and records in support, during the investigation meeting yielded an agreed figure of \$621 underpaid.

[8] Payment of \$621 is ordered accordingly.

#### 2. Public holiday pay

[9] The issue arising in respect of the claim for public holiday pay was whether Mrs Cann should have been paid for 8 hours instead of 6 hours for specified public holidays falling on days on which she would otherwise have worked.

[10] FFL's records showed that Mrs Cann worked for 8 hours or more on Mondays, being the day of the week on which most of the public holidays in question fell. Accordingly the claim in respect of the 2009 calendar year is accepted, save that payment was received for one of the holidays and claimed and I make the necessary adjustment. The total owed is \$190.90.

[11] Payment was shown to have been made for two of the holidays claimed in respect of the 2010 calendar year, and the remaining minor claim was withdrawn.

[12] Payment of \$190.90 is ordered accordingly.

### 3. Sick leave

[13] The claim for sick leave was based on an assumption that 8 hours would have been worked on the days in question. However since Mrs Cann's actual hours of work did vary, and the record of hours for which she was scheduled to work on the days in question corresponded with the number of hours for which she was paid, the claim was withdrawn.

### **The alleged breach of settlement**

[14] In that Mrs Fandam did not provide Mrs Cann with the required details of Kiwisaver payments within the specified time, she breached clause 6. On the other hand the details were available from the IRD in any event, and Mr Cann obtained them from that source. Although this does not excuse Mrs Fandam from observing the obligation to which she had agreed, in the circumstances I do not consider a penalty is warranted and make no order.

[15] There is a further concern that employer contributions to Mrs Cann's Kiwisaver scheme were not remitted to the IRD. Mrs Fandam accepted that the employer's contributions to Kiwisaver were not remitted to the IRD, and advised that she is addressing the matter with the IRD. She has entered into a repayment arrangement which includes payment of the employer contributions to Kiwisaver.

[16] The possibility of further penalties was raised in respect of that matter. However the Employment Relations Authority has no power to order the payment of penalties beyond the specific powers set out in the Employment Relations Act and some other legislation. In particular, the Authority has no power to order penalties for breach of the Kiwisaver Act 2006. Accordingly there will be no further order.

**Summary of orders**

[17] FFL is ordered to pay to Mrs Cann:

- (a) \$621 (gross) as unpaid holiday pay; and
- (b) \$190.90 (gross) as unpaid statutory holiday pay.

[18] Interest is to be paid on the above amounts calculated at the rate of 5% from 15 December 2010 to the date of payment.

**Costs**

[19] FFL is further ordered to reimburse Mrs Cann for the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority