

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 118  
5308609

BETWEEN                    EMMA CHRISTIE  
   Applicant  
  
AND                            BROWNS LIMITED  
   Respondent

Member of Authority:     Alastair Dumbleton  
  
Representatives:           Kirsty Marshall, counsel for Applicant  
   Kirsten Bilkey, advocate for Respondent  
  
Investigation Meeting:    2 March 2011  
  
  
  
  
  
  
  
  
  
Determination:            29 March 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The Authority has investigated a claim by the applicant Ms Emma Christie that the respondent Browns Ltd failed to pay wages and holiday pay owing at the end of an employment relationship. Ms Christie seeks an order from the Authority requiring Browns Ltd to pay \$961.00 as wages and \$76.88 as proportionate annual holiday pay.

[2]     Ms Christie also seeks \$2,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 for hurt and humiliation. She seeks a penalty for a breach of her employment agreement with Browns Ltd and a further penalty for breach by the company of the statutory duty of good faith required under s 4 of the Act. Also she seeks a penalty pursuant to s 75(1)(b) of the Holidays Act 2003 in relation to the failure to pay holiday pay on the arrears claimed.

[3] Ms Christie and Browns Ltd may agree that this matter should have been resolved in a far less expensive and time consuming way for them than an Authority investigation could offer in the circumstances of this case. Ms Christie has incurred more in legal costs than the relatively small amount of her claim, and the owners and managers of Browns Ltd have been distracted from putting their time more profitably into their business. It is acknowledged that the parties tried to settle their differences in mediation.

[4] Ms Christie, who is a university student, was employed by Browns Ltd as a Salesperson in its clothing store over the summer holiday period, between 17 November 2009 and 17 February 2010.

[5] When Ms Christie finished on 17 February she expected that on the next pay day she would receive a final pay calculated at \$2.00 per hour for every hour she had worked while employed. When about a week after finishing she asked about this the manager of the store, Ms Kirsten Bilkey, told her the final payout was being withheld because she was not entitled to it under the employment agreement.

[6] A written employment agreement had been signed by Ms Christie in December 2009 after starting her employment with Browns Ltd. The material term as to her wages was at clause 6(a), which provided:

(a) *The pay rate will be \$15.00 per hour plus a \$2.00 per hour bonus paid on the next following pay week to the 17th February for working the required rosters over this fixed period.*

[7] Ms Christie has brought her claim on the basis that she worked the required rosters over the entire “fixed period” of her employment and in accordance with the plain meaning of clause 6(a) became entitled to the \$2.00 per hour bonus.

[8] Browns Ltd through Ms Bilkey presented to the Authority a number of reasons why Ms Christie’s claim to the bonus payment had been rejected.

[9] While Browns Ltd accepts that Ms Christie in the physical sense worked all the rosters over the period of employment, it claims that Ms Christie did not discharge a duty to keep property of the store secure and that in relation to a pair of jeans she acquired from stock, she had had a dishonest intention despite paying for the clothing when she left. Further Browns Ltd claims that Ms Christie had not been co-operative during an investigation into irregularities and possible breaches in relation to store security.

[10] The investigation of this case by the Authority has highlighted significant deficiencies in the parties' written employment agreement. In one respect the law simply does not permit what the agreement purports to provide, in relation to its expressed fixed term. In respect of Ms Christie's claim, although clause 6(a) might seem clear enough it has led to differences of interpretation between the parties.

### **Bonus pay**

[11] The employer's resistance to paying the \$2.00 per hour bonus under clause 6(a) is said to have arisen because of the circumstances in which Ms Christie acquired a pair of jeans that were originally Browns Ltd stock in the store where she worked as a Salesperson. Ms Bilkey's evidence to the Authority was that Ms Christie would have been paid the bonus "if the jeans event hadn't occurred." Ms Bilkey viewed Ms Christie as having a dishonest intent in that, according to Ms Bilkey, she had acted in a way designed to leave her in possession of the jeans without paying for them.

[12] There was a chain of circumstances that led Ms Bilkey to become suspicious of Ms Christie and her actions. On 30 December 2009 Ms Christie took away from the store a pair of Browns Ltd own-brand jeans. She filled in an invoice in the store's Appro Book used to record the movement of stock on appro. She recorded her name, the type of jeans and their stock number, and she also wrote "Ang approved ... Jenny to price." Ang was the Assistant Manager and had given Ms Christie approval to take the jeans on appro. Jenny was in management and the person who would normally determine the discount staff members could get for stock being purchased by them.

[13] Ms Christie wore the jeans in the store on several occasions while she continued working there over the next two months. On 17 February 2010, her last day, she settled up her layby account and then, when asked whether she had paid for the Browns jeans she was wearing replied that she had not and paid the price for those, about \$90. She has explained that she had simply forgotten to find out a price for them from Jenny, who had been away on leave during January, and had had no intention to take advantage of the situation and leave without paying for the jeans.

[14] Irregularities in keeping the Appro Book also increased the suspicions of Ms Bilkey. The usual procedure is that when goods on appro are not going to be purchased and have been returned a line is to be drawn across an invoice in the book and the page is to be folded in two to indicate that the appro has concluded. In this case the page had been folded but there was

no line through it. Ms Christie denied that she had altered the book in that way to make it look as though the jeans taken on appro had been either returned or purchased by her.

[15] Ms Bilkey's suspicions were heightened because a magnetic tagging machine was found to have been interfered with. It was discovered out the back of the store, removed from where it had previously been fixed to a counter. There were also items of stock found to have had their magnetic tags removed. It is understandable that Browns Ltd had concerns about security at this time, because recently a robbery had taken place at its store. Ms Bilkey was suspicious that some staff might have assisted the robbers by supplying inside information.

[16] Further Ms Bilkey held it against Ms Christie that she had been unhelpful when inquiries were made about the irregularities and breaches of security. Ms Christie says she knew nothing about those matters and could not help explain them. Most of the inquiries also seem to have been made after the employment relationship had ended.

[17] Ultimately this dispute must be decided by interpreting clause 6(a). The Authority must determine the intention of the parties from the words they used when putting that provision in their employment agreement.

[18] I agree with the submission of counsel Ms Marshall for Ms Christie that clause 6(a) does not create a discretionary bonus in the sense that it was optional whether the employer paid it or not. Payment is clearly expressed to be dependent on an event occurring – “working the required rosters over this fixed period” – and I find that this is what happened. Accordingly, Ms Christie became entitled to the bonus on 17 February when she finished her employment. It was required to be paid to her in the following pay week, on 26 February 2010. Unfortunately during the period between 17 and 26 February because of her suspicions Ms Bilkey decided that Ms Christie had not become entitled to the bonus despite having worked the required rosters over the entire period of employment.

[19] Suspicion is one thing, proof entirely another. Mere suspicion is an insufficient reason for rejecting a claim for wages by an employee who has performed the work required of her. That performance I find was the trigger the parties intended in clause 6(a) to payment of \$2.00 per hour bonus for working the required rosters throughout the employment period.

[20] I find that there is no basis for putting a gloss on the expression “for working the required rosters” as Browns Ltd has tried to do. I find that Ms Christie physically worked the required rosters and did so without causing harm or loss to her employer. Whatever

suspicions Ms Bilkey had and on whatever basis she felt entitled to have those suspicions, Ms Christie had done what was required of her.

[21] During any employment an employer has remedies available if it suspects its employee of dishonesty or misconduct. These were not exercised against Ms Christie. The employer could have complained to the Police as well, although the most likely reason why it did not was because Ms Bilkey merely had suspicions.

[22] Further, if Ms Christie had caused harm or loss to the employer Browns Ltd could have brought a claim for damages based on a breach of the terms of the employment agreement.

[23] An issue was also raised by Browns Ltd as to whether the swapping by Ms Christie of one or two of her rostered work days for different days rostered to another employee, meant that she had not worked the “required rosters” in terms of clause 6(a). The swap had been at the request of the other employee and for her convenience. In the way clause 6(a) is intended to operate by suspending payment of a bonus paid per hour worked until the completion of the employment, it is a less usual provision to be found in an employment agreement. It could be improved with some redrafting to make it clear that a sales person working under the clause may not swap a roster at the request of another employee, if that is what Browns Ltd intends. A number of arguments were put forward by Ms Bilkey as to why swapping a roster in the way Ms Christie did at the request of another employee caused some disadvantages to the employer. As these are quite apparent to Ms Bilkey there should be no difficulty in making clause 6(a) much clearer as to the employer’s requirements.

[24] I find that the swapping of the weekend work rostered for 16 January and 30 January by Ms Christie with another employee was not a basis on which Ms Christie’s claim could be declined in the absence in any express prohibition against swapping rostered days of work, a normal event in many employment relationships. Doing so on two occasions only was not something that prevented Ms Christie from recovering the bonus in the way the provision has been drafted.

### **Determination**

[25] I find that Ms Christie is entitled to recover the amount claimed as the bonus, \$961.00. It follows that she is also entitled to holiday pay on that amount in the sum of \$76.88.

[26] Interest has been claimed and I find Ms Christie should be reimbursed for the loss of the use of the bonus money at the rate of 4.5% per annum, payable from 26 February 2010.

### **Compensation**

[27] Compensation has been claimed under s 123(1)(c)(i) of the Act. I find there is no basis at all for granting this particular remedy. It relates to a personal grievance, but a grievance has not been raised and by itself a claim for compensation does not raise a grievance. In any event a grievance must be raised within 90 days. Further, the employer's complained of actions – accusing Ms Christie of dishonesty - occurred after the employment had ended and in principle could not be the basis of a personal grievance claim.

### **Penalties**

[28] Penalties have been sought for what are claimed to be three separate breaches. The Authority has determined that Ms Christie was entitled to the bonus payment and that Browns Ltd failed to pay those wages to her. It must follow that the employer breached the employment agreement and that therefore it is liable to a penalty under s 134 of the Act.

[29] A penalty is also claimed under the Holidays Act for the consequent failure to pay \$76.88 as holiday pay on the wages due, but in my view although there was a breach it was not the real or substantial wrong in this case and a penalty under the Holidays Act is not warranted.

[30] In relation to good faith I find that the employment relationship giving rise to the duty to deal in good faith had effectively ended on the last day of the employment, 17 February. Impugning Ms Christie's honesty, as Browns Ltd did after 17 February, was not by then a breach of good faith. A bare contractual obligation to pay the bonus on 26 February survived the employment relationship but without carrying with it the good faith obligations.

[31] Duplication of penalty claims is also to be avoided in cases where the same breach may give rise to penalties under separate provisions. In the circumstances of this case where there was a failure to pay wages due, s 134 applies best. I find that although there was a breach of an expressed term of the employment agreement, clause 6(a), the failure of the employer was based on its misunderstanding of that provision. Ms Bilkey did honestly believe Ms Christie had done something to disentitle her to the bonus payment, so this is not a case where one party has acted arbitrarily or with intent to undermine an employment relationship. In the circumstances I decline to award a penalty.

**“Fixed term contract” - Public holiday pay**

[32] Ms Bilkey raised an issue about payments that were made to Ms Christie for the four public holidays over the Christmas - New Year period and for the holiday of Auckland Anniversary Day in January (Waitangi Day, 6 February, fell on a Saturday in 2011). It was claimed that under the terms of her employment agreement Ms Christie had no entitlement to be paid for those 5 public holidays and had therefore been overpaid a total of \$573.38, for which recovery from her was sought.

[33] In claiming that Ms Christie had been ineligible for paid public holidays Ms Bilkey drew attention to clause 7(h) of the employment agreement, which provided as follows:

*(h) You are not eligible for pay for a public holiday during your fixed term contract. You will not be rostered or required to work on Christmas Day Boxing Day or the days in lieu of, or New Years Day, 2nd January or the days in Lieu of, or Anniversary Day, or Waitangi Day. These times are deemed to be a fixed term contract, and will not continue past these set dates.*

[34] The fixed term nature of Ms Christie’s employment is referred to at the beginning of the employment agreement where clause 1 provided that her employment was:

*... as Flexible Part-Time Sales person for the Christmas and Holiday Season on a fixed contract not including any public holidays.*

[35] Immediately after that provision at clause 2(a) is the term of agreement which provided it was to be “17th November 2009 – 17th February 2010.” It appears therefore from clause 2(a) that the “fixed contract” did include public holidays falling within the express term.

[36] The wages provision at clause 6 also seemed to contemplate payment for public holidays, where it provided:

*(d) For the purposes of public holiday pay and sick and bereavement pay, relevant daily pay will be paid. This is defined as the amount that the employee would have received had the employee worked on the day concerned ...*

[37] Section 46 of the Holidays Act 2003 provides the entitlement to public holidays of employees:

- (1) *An employee is entitled to public holidays, and payment for those holidays, in accordance with this sub-part.*
- (2) *Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.*

[38] Section 49 of the Holidays Act provides as follows:

*If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay for that day.*

[39] The way the employment agreement has been drafted creates considerable confusion with regard to public holidays and other matters. There are problems with the agreement arising from the provisions of the Employment Relations Act that apply to fixed term employment. Principally, if an employee and an employer agree that the employment of the employee will end at the close of a specified date or period, or on the occurrence of a specified event as appears was the case here, the employment agreement must state in writing the way in which the employment will end and also the reasons for ending the employment in that way. If this was intended to be a fixed term contract it did not comply with s 66.

[40] It is clear that a fixed term contract was intended by Browns Ltd and Ms Christie to last for the duration of her university summer holidays. However it is quite unclear what was meant by saying at clause 7(h) that the particular public holidays referred to are "times ... deemed to be a fixed term contract, and will not continue past these set dates". This suggests a series of fixed terms of one or two days, each occurring within the overall fixed term of three months.

[41] The confused wording of the agreement in this part suggests that Ms Christie was intended to be employed on a casual or day by day basis, so that the employer did not have to call upon her to work any particular days. That is not the way the employment worked in practice, because of other wording in the agreement and because Ms Christie's work was performed in accordance with rosters drawn up for periods of time much longer than one day by the employer. There is for example the roster produced for January 2010 which covers the entire month and shows Ms Christie as rostered on many days over that period, in which fell the public holiday of Auckland Anniversary day.

[42] I find that Ms Christie was employed continuously between 17 November 2009 and 17 February 2010. Therefore under the Holidays Act she was entitled to payments she received for the five public holidays falling within that period, whether or not she worked on those days. I find that Ms Christie has not been overpaid in relation to them.

**Costs**

[43] Ms Christie is entitled to some compensation for her legal costs incurred in bringing this claim. Unfortunately they seem to have exceeded the amount that was in dispute. Both parties may well be left questioning why they let this matter go so far as to require an investigation by the Authority, with the cost Ms Christie has incurred on her side and the loss of productive time by Ms Bilkey and Mr Bilkey on theirs. However the parties had the opportunity of mediation as the preferred way of resolving the matter, allowing them to move on to more profitable activities than this one has been.

[44] As a contribution to costs I award \$1,650 to Ms Christie.

A Dumbleton  
**Member of the Employment Relations Authority**