IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 156
5352017

	BETWEEN	DONNA DANKS Applicant
	AND	HAILES & ASSOCIATES LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	E Hartdegen, counsel for applicant R Upton, counsel for respondent
Investigation Meeting:	27 February and 6 March 2012
Determination:	9 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Donna Danks says her former employer Hailes & Associates Limited (HAL) owes her money in respect of:

(a) underpaid wages; and
(b) the reimbursement of study fees.

[2] According to the statement of problem penalties were sought for breaches of the employment agreement in respect of failures to pay holiday pay during employment and the failure to pay holiday pay due on the termination of employment, and for unspecified breaches of good faith.

[3] Mrs Danks also says HAL dismissed her unjustifiably on 18 March 2011, and she has raised a personal grievance in that respect. HAL denies that Mrs Danks was dismissed, and says she left work of her own accord on 18 March. HAL expected that she would return.

[4] Finally, HAL has counterclaimed, seeking damages for Mrs Danks' breach of the obligation to provide reasonable notice of the termination of her employment - being notice of one month - as well as a penalty for that breach.

The claim for underpaid wages

1. Hourly rate of pay

[5] Mrs Danks' principal claim for underpaid wages requires a determination of the terms of the parties' agreement on the hourly rate of pay. If the agreement was as Mrs Danks alleges, then she was underpaid.

(a) The terms of the agreement

[6] HAL is a firm of accountants. Mrs Danks is a bookkeeper/accountant. She had worked for HAL between 2003 and 2006, and in November 2007 she approached one of its two shareholders, Stephen Hailes, for a reference. At the time HAL was short staffed, so Mr Hailes asked Mrs Danks if she was looking for a job. A further series of conversations followed - including one at Mrs Danks' home - during which the parties discussed their expectations and explored the possibility of entering into an employment relationship.

[7] By email message dated 12 December 2007 Mr Hailes set out what was described in the message as a: '*summary of what I would like to offer you'*. The summary included:

- The preferred option for hours of work was 40 per week, but this was '*up for discussion'*; and
- Remuneration was an annual salary calculated at $35 per hour for the first 18 months, increasing to $40 per hour after 18 months.

[8] Mrs Danks said variations to the offer were agreed as follows:

- Hours of work would not be full time, rather they would centre on her children's school hours and she would work as many hours as possible;
- The rate of pay at the commencement of employment would be $35 per hour;
- There would be two stepped increases in pay, being, -
  - to $37.50 per hour after 9 months, and
  - to $40 per hour after 18 months.

[9] Mrs Danks asserted that there were additional email messages in which terms of employment were discussed, but Mr Hailes did not recall receiving any of them and neither party produced copies. I place no weight on the assertions although I accept that the purpose of the 12 December message was to 'get the ball rolling' in the negotiations. Beyond that there was no written record of what was agreed - extending to the absence of a letter of appointment or a written employment agreement - and the only other evidence available to the Authority was the parties' accounts of events occurring four years before the investigation meeting.

[10] Mr Hailes' view of the 12 December message was that the offer it sketched was based on Mrs Danks working full time. However nothing in the message suggested that changes to the proposed hours of work provision could affect other terms such as the hourly rate of pay. As Mr Hailes knew already, Mrs Danks had young children and preferred flexible working hours.

[11] Mr Hailes and the other shareholder, Lynn Hailes, did not consider a part time arrangement to be ideal but agreed to it because they wanted Mrs Danks' services. However their evidence was that they sought to reflect the arrangement in amendments to other terms referred to in the 12 December summary, particularly the rate of remuneration. According to them, it was therefore agreed that the hourly rate would commence at $35 per hour and would be reviewed after 9 months' continuous service. Further, 'nine months' continuous service' meant the equivalent of 9 months' full time service, not 9 calendar months of unbroken service. Thus, as a part time employee, Mrs Danks would not receive a review until she had worked for the equivalent of 9 months' full time hours. Not only that, any increase would be subject to Mrs Danks' satisfactory performance of her duties and was not guaranteed.

[12] Mrs Danks denied any agreement that after 9 months there would be a review but no guarantee of an increase in her hourly rate, or that 'continuous service' had the meaning Mr and Mrs Hailes contended.

[13] In further support of her view of the parties' agreement Mrs Danks had noted on her copy of the 12 December message that her negotiating position was to seek payment at $40 per hour from the commencement of employment, then when that was not successful she sought an increase to $37.50 after 9 months and to $40 after 18 months. She said she incorporated the position in one of the emailed messages which was not available to be produced. Without the message I do not give any weight to that assertion, but I accept the notation on the 12 December message was Mrs Danks' record of the negotiating stance she took.

[14] I resolve the parties' dispute about what was agreed by saying I find Mrs Danks' account inherently more likely.

[15] The reasons are first that Mrs Danks had the upper hand in the negotiations because she was already in employment herself, while HAL needed her services.

[16] Secondly, as shown by the 12 December message, Mr Hailes was prepared to offer $40 per hour after 18 months. The circumstances of the negotiation mean that, in the absence of any documentation to the contrary, I consider it unlikely he could resile from any offer to pay that or any rate above $35 per hour at all in response to Mrs Danks' seeking part time hours of work. It is similarly unlikely that, with the prospect of achieving payment at a rate of $40 per hour having been raised, Mrs Danks would decide not to pursue it. More generally, I take into account that agreement on a stepped process of specified pay increases is not unusual although I acknowledge that the same can be said of agreements that the rate of pay will be reviewed with no increase being guaranteed. Overall here, I find it more likely that a compromise position of the kind suggested by Mrs Danks' evidence was reached.

[17] Thirdly, Mr and Mrs Hailes' contended meaning of 'continuous service' is unusual, and was not supported by any contractual document including a letter of appointment or a written employment agreement. There was a notation to the effect contended by Mr and Mrs Hailes on a payslip generated by the MYOB system HAL

used, but the notation did not appear on the original payslip and MYOB allows notations of that kind to be added later. I find it likely that occurred here - although this does not extend to any finding of mala fides in respect of that action - and do not accept the contended meaning of 'continuous service'.

[18] Fourthly, there is no evidence beyond the assertions made at or about the time the dispute arose that any increase in Mrs Danks' rate of pay would depend on a satisfactory level of performance.

[19] For these reasons I conclude on the balance of probabilities that the parties agreed Mrs Danks would receive an increase in her hourly rate of pay to $37.50 after 9 months' service, and a further increase to $40 per hour after 18 months' service.

(b) The underpayment

[20] Mrs Danks' employment began on 7 April 2008. She said that after 9 months she approached Mr Hailes about the increase in her rate of pay to $37.50 per hour. She said she felt she was palmed off. When she followed up she was advised that the pay increase was to occur after she had worked the equivalent of 9 months' full time service. The review duly occurred in March 2009 and, by negotiation according to HAL, the rate was increased to $37.50. Payment at that rate commenced in the week ending 27 March 2009.

[21] As no claim has been made in respect of the increase from $35 per hour to $37.50 per hour, I do not take that matter any further.

[22] There was a further review in November 2009, being 18 months' 'continuous service' from the date of commencement of employment by HAL's calculation. By then Mr Hailes had become dissatisfied with aspects of Mrs Danks' performance, and no further increase was offered.

[23] My finding about the terms of the parties' agreement means Mrs Danks' rate of pay should have been increased from $37.50 to $40 per hour in October 2009. Her calculation of the resulting underpayment was not detailed but she identified the sum of $4,557.30. That means she is claiming for 1823 hours. From the wage and time

record supplied at my request, the number of hours paid for from mid-October 2009 to the last payment in 2011 was 1771.

[24] HAL is therefore ordered to pay Mrs Danks :

- $2.50 x 1771 = $4,445; plus
- holiday pay on that amount.

2. Additional claims for payment

[25] Additional claims for payment, not identified in the statement of problem, were included in Mrs Danks' brief of evidence.

[26] Some of the claims arise in respect of the period prior to 18 March 2011, when Mrs Danks says her employment ended. They are for payment on 2, 3 and 4 February 2011 (and should not have included 5 February as that was a Saturday), and for a ½ day on 18 March 2011. Despite the unsatisfactory way in which they were raised I deal with the claims because the underlying facts were discussed in evidence in any event, and only small amounts were sought.

[27] The parties had agreed Mrs Danks would return to work on 2 February, but she was unable to do so because of illness. She and Mr Hailes had a conversation about HAL's relatively low workload at the time, and whether a delayed start date on 7 February would be convenient for both parties. The matter of Mrs Danks' return to work was one of the many areas in the evidence of both parties where conflicting assertions were made and I could not rely on either account. On this occasion, although Mrs Danks sought to query shortly afterwards whether she would be paid for 2, 3 and 4 February, I find it likely more likely that a delayed start date was convenient to both parties and was agreed. There will be no order for the payment sought.

[28] If this conclusion is wrong then Mrs Danks should have been paid sick pay, but the wage and time record indicates it is unlikely she had any outstanding entitlement to such payment.

[29] For reasons I will identify while addressing the personal grievance, I find Mrs Danks was not entitled to payment for a half day on 18 March.

[30] The remainder of the claims Mrs Danks listed as claims for lost wages concern the difference between income she earned from an alternative contracting position obtained in March 2011 and income she says she would have earned from HAL. That is a claim for earnings lost as a result of the personal grievance, and will be addressed in that context.

Reimbursement of study fees

[31] Mrs Danks was pursuing a course of study towards a Bachelor of Business degree with the Open Polytechnic of New Zealand (TOPNZ). There is no written record of the parties' agreement on her entitlement to reimbursement by HAL of her course fees, and no other reference to the matter beyond one in the 12 December 2007 message. The relevant provision was: '*We would pay course fees for one paper per semester.'*

[32] HAL said the agreement was that Mrs Danks would be reimbursed for courses she completed successfully. Beyond that assertion there was no written or oral evidence of such an agreement, so I turn to the way in which the parties addressed the matter in practice.

[33] HAL reimbursed Mrs Danks for one course, apparently in the sum of $584 and apparently on the production to it of a 'fees quotation' dated July 2008. The document was not an invoice and was not - and did not purport to be - confirmation of enrolment because of the advice in it that invoices were issued only on confirmation of enrolment. Otherwise neither party was able to give an accurate account of the circumstances in which that payment was made.

[34] Mrs Danks enrolled in a number of courses subsequently, but if she did not pass the courses she did not seek reimbursement of fees she had paid. In or about September or October 2010, however, she sought reimbursement for a further course. The request was declined. Again neither party was able to give an accurate account of the circumstances of that request, except that Mr Hailes said he advised Mrs Danks

she would be reimbursed if she passed the course. Mrs Danks now seeks an order for the reimbursement of fees for all courses for which fees were paid during her employment.

[35] I resolve the claim by saying that in the absence of any other information about the parties' agreement I would have held HAL to the limited wording in the 12 December message, and would have ordered the payment sought on the production of invoices, but for the subsequent conduct of the parties. In particular Mrs Danks herself did not seek payment of courses not passed when she could have, which I regard as recognition that there would be no reimbursement for courses not passed. There will be no order in respect of those courses.

[36] Regarding the course for which payment was sought in or about September 2010, Mrs Danks is entitled to be reimbursed for it if she completed and passed it. As I understand it that did not occur. However if it did, HAL is ordered to reimburse Mrs Danks for the course upon the production of an invoice in respect of the course together with evidence that it was passed.

Claims for penalties

1. Holiday pay

[37] There is no claim before the Authority for a penalty for breach of the Holidays Act 2003, as s 76(1) provides that actions to recover such penalties may be brought only by a Labour Inspector. Accordingly the claim for penalty alleged breaches of the employment agreement for the failure to pay holiday pay 'each year', and for the failure to pay holiday pay due on the termination of Mrs Danks' employment.

[38] Not least of the reasons why I required more particularity in the claim for penalties was that s 135(5) of the Employment Relations Act 2000 provides that actions for the recovery of a penalty must be commenced within 12 months of:

- the date when the cause of action first became known to the person bringing the action; or

- the date on which the cause of action should reasonably have become known to the person bringing the action.

[39] The statement of problem was lodged on 1 August 2011, so in the present circumstances I do not address allegations of breaches occurring prior to 1 August 2010. Further to the alleged failure to pay holiday pay 'each year', I address only a failure to pay holiday pay at the end of the summer holiday of 2010-2011. The claim for a penalty for the failure to pay holiday pay due on the termination of Mrs Danks' employment was in time and can be addressed.

A. Failure to pay holiday pay after the summer holiday of 2010-2011

[40] The claim for a penalty was based on a breach of the employment agreement, but there was limited evidence and no argument regarding the terms of the parties' agreement, such as whether the agreement incorporated the statutory provisions or any agreed amendments or enhancements.

[41] The wage and time record indicates Mrs Danks worked flexible hours particularly during school holiday periods. She did not work at all over the school summer holiday period and some other school holiday periods. She was not paid for her summer holiday and other school holiday absences. HAL said this was by agreement because Mrs Danks' hours of work meant she could not accumulate sufficient entitlement to payment to cover the full holiday period. Instead of applying any accumulated entitlement so that she was paid for the period, Mrs Danks continued to accumulate the entitlement.

[42] It was difficult to obtain a reliable account of the arrangements. When giving oral evidence Mr Hailes tended to lack accuracy while Mrs Danks descended repeatedly into unhelpful and emotive accusation. I consider it likely, however, that in general the parties had agreed that Mrs Danks would not be paid during her absences on school holidays, and that from time to time the matter was discussed prior to particular holidays. The parties neglected to address Mrs Danks' accumulating entitlement to paid leave, but I consider it unlikely there was anything deliberate about this.

[43] On 23 December 2010 Mrs Danks commenced the summer holiday absence which was to continue until 2 February 2011, when school reopened. Her evidence was that she expected and wished to be paid in full for that absence. According to Mr Hailes, the parties had agreed before the commencement of the absence that she would receive a payment of two weeks' annual leave for the period. The wage and time record shows that a payment of annual leave was made on 31 December 2010.

[44] Mrs Danks appeared at least to acquiesce in the arrangements, and did not express concern until early 2011. In an emailed message dated 3 February 2011 she expressed the view that HAL was in breach of the Holidays Act 2003 for failing to pay her holiday pay. The message asked that the matter be rectified.

[45] Mr Hailes denied receiving the 3 February email. The message was addressed correctly, and there was no information about any difficulties with the IT system or the ISP provider to explain why the message was not received. However it was common ground that Mr Hailes and Mrs Danks discussed the existence of the email later, and Mr Hailes told Mrs Danks he had not received it. I accept Mr Hailes' evidence that, when he asked Mrs Danks if she wished to go through the points in the email she said she did not. Accordingly the contents of the message were not discussed and the problems identified in the message were not addressed as they could have been.

[46] Even so, from time to time Mrs Danks brought up the matter of payment again. Some time after February she was advised that HAL could not afford to pay her outstanding entitlement in one lump sum. Also at some time after February HAL was advised that s 27 of the Holidays Act[1] meant it needed to be careful about when payments of this kind should be made. The matter remained outstanding until the circumstances of the termination of Mrs Danks' employment were clarified in May 2011, and was overtaken by those circumstances.

[47] Bearing in mind that this is a claim for a penalty, then even if I accept the failure to pay Mrs Danks' holiday pay in full in respect of the summer holiday period 2010-2011 was a breach of the parties' employment agreement I am not satisfied that the circumstances of the failure to pay warrant the imposition on HAL of a penalty.

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[1] Which refers to when payment for annual leave must be made

B. Failure to pay holiday pay due on the termination of employment

[48] Mrs Danks says she was dismissed on 18 March 2011 and her outstanding annual leave entitlement was payable to her then. Whether there was a dismissal on 18 March is the issue in the personal grievance, and as discussed later in this determination HAL considered Mrs Danks' status unclear for several weeks. In those circumstances Mrs Danks did not receive payment in respect of her outstanding holiday pay on 18 March.

[49] By letter dated 30 May 2011, replying to a letter from Mrs Danks' then-representative dated earlier in May, Mr Upton advised that the request for the payment of holiday pay was being taken as confirmation that Mrs Danks' employment had ended. If that was the case, then payment would be made the following week.

[50] The termination of employment proceeded and payment was duly made.

[51] For that reason and in the light of my findings in respect of the dismissal, there will no order for the payment of a penalty.

2. Breach of good faith

[52] None of the alleged breaches of good faith being relied in support of this claim was specified or particularised and there were no submissions on the matter. There will be no order for the payment of a penalty.

The termination of employment

1. Events prior to 18 March 2011

[53] I have referred to the fact that Mrs Danks did not return to work on 2 February 2011 as planned because she was ill, as well as to the discussion about a delayed return on 7 February because the workload was relatively light at the time.

[54] Mrs Danks said workloads were discussed again at a meeting she had with Mr Hailes on 14 February. Mrs Danks said Mr Hailes raised the slowdown in workloads saying there would be nothing for her until the 'season' set in. It was common ground that accounting work fell off between February and April every year. It was also common ground that it was open to Mrs Danks to obtain alternative short term contract work during the slower period if she wished. Finally it was common ground that Mrs Danks asked in February 2011 if she could source some outside work. Mr Hailes agreed and responded that she should keep him 'in the loop'.

[55] Accordingly, in or about mid-February Mrs Danks began seeking short term contract work. Some of the approaches she made by email at the time recognised that HAL was experiencing a slow period, and in one of the messages she said she was seeking to '*fill the off season in accountancy work'*. Meanwhile she continued to report for work in February and the first half of March.

2. Events of 18 March 2011

[56] Mrs Danks said her wish for holiday pay was discussed again on the morning of 18 March, although on the information available to the Authority she has not relied on the discussion or the wider issue it concerned as a reason for her departure from work that day.

[57] Mr Hailes said on the morning of 18 March he had a discussion with Mrs Danks about current work in progress, she did not raise any other issues, and he was unaware of anything out of the ordinary. It was common ground that the work in progress was discussed, and I find there was no discussion to the effect that no further work was available to Mrs Danks.

[58] At about lunch time that day Mrs Danks decided she had completed the work allocated to her and that there was no more work available, so she discussed the lack of work with a colleague and left the office. HAL denied there was no work left for Mrs Danks to do, and said Mrs Danks was needed to supervise work being done by her more junior colleague.

[59] I do not accept that Mrs Danks was entitled to or had permission to leave work. I do not accept there was no work for her at the time she left HAL's offices, and whether or not that conclusion is correct I do not accept she was entitled to form that view for herself and to leave the office without making any attempt to confirm her view or to discuss her intentions.

[60] Further, even on her evidence nothing in HAL's actions could give Mrs Danks reasonable grounds for believing on 18 March that it had terminated her employment. Moreover, that was not her understanding at the time. For example, in an emailed message dated 26 March 2011 she received a response to one of the approaches she had made regarding short term contract work. She replied by saying:

> *Im at a kind of crossroads with work ... I haven't resigned from Hailes yet but haven't been pushed too much work since Xmas break so have found contract work elsewhere in the meantime ...*

[61] I have reservations about the accuracy of the respective accounts of the conversations that followed Mrs Danks' departure on 18 March, and in particular about the timing of them. However, according to Mrs Danks, on or about the afternoon of 18 March she concluded an arrangement for short term work elsewhere. She telephoned Mr Hailes to advise him of this, and said she would be unavailable from Mondays to Thursdays as a result. Mr Hailes agreed to the arrangement.

[62] According to Mr Hailes, either on 18 March or shortly afterwards, he also explained that when hours picked up again he expected Mrs Danks to return to her full hours of work. Further, Mr Hailes understood from the conversation that Mrs Danks would continue to report for work on a reduced basis. However she did not report for work the following week, and did not report for work again.

[63] There were inaccuracies or inconsistencies between the evidence of Mr and Mrs Hailes about whether from mid-March Mrs Danks was to work for one day a week or two in the short term, and what they decided to do about it. It appears at least that they found the prospect of Mrs Danks' working one day a week rather than two unhelpful to the point they were prepared to continue without her services at all until work picked up. Accordingly they did not follow up with Mrs Danks later in March or early in April on her failures to report for work.

[64] For her part Mrs Danks said that when she left on 18 March she understood Mr Hailes would contact her when work became available. She awaited contact from him which did not come.

[65] The existence of a misunderstanding regarding Mrs Danks' attendance at work should have become clear when Mrs Danks telephoned HAL on or about 15 April.

[66] Again I have reservations about the accuracy of the accounts of this exchange, and of Mr Hailes' denials. However I find it likely that at some point during Mrs Danks' absence, probably in April, there was a conversation on the telephone in which Mr Hailes told Mrs Danks that, because she had not reported for work, he had assumed she was not returning. She pointed out that he had not contacted her, so she assumed there was no work for her.

[67] Unfortunately the misunderstanding was not resolved. Even more unfortunately Mrs Danks went further and assumed she had been replaced in HAL's employment, so was no longer needed. That was not the case. Mrs Danks did not accept this, so she continued as she was and made no further attempt to resume her employment. HAL made no further attempt to contact her.

[68] The next time Mrs Danks was in the area where HAL's offices were located was 6 May 2011. She called into the offices of HAL to collect her belongings. Mr Hailes asked to speak to her. Mrs Danks' account in her statement of evidence of the resulting conversation was:

> *53. ... It was his usual level of spin-doctoring, telling me what he had said was not what he said, and what I said was not what I had said previously and attempting to retract previous conversations, or pretend they never happened. He said my job was still open and it was up to me really if I returned to work or not.*
>
> *54. I told him if it was coming down to what he said, and she said, then I was not really up for a conversation. I also told him that I had received legal advice prior to phoning him about the contract work undertaken, and I was certain of what I had told him on the afternoon of 18 March about the contract work I had taken on. I said I was there to collect my belongings on the basis of his previous communications to me.*

[69] This account demonstrates Mrs Danks' critical attitude towards Mr Hailes, her lack of acceptance of the possibility of a misunderstanding, and her refusal to engage

with him in a manner that could have resolved the misunderstandings as well as the future of her employment.

[70] Mr Hailes' evidence was that he wanted to talk to Mrs Danks about what was going on. Her absence was having an impact on the business and he was picking up work she would otherwise have done. I accept that Mr Hailes was attempting to confirm and clarify Mrs Danks' intentions and the status of the employment relationship. I would also say that, if he was experiencing the difficulties he said he was, he should have been proactive in contacting Mrs Danks before then, and should have stated HAL's position clearly to her.

[71] There was a further attempt to clarify matters in Mr Upton's letter of 30 May. The letter said:

> *.. My client has not dismissed Mrs Danks. It is therefore assuming that her request to have her annual leave paid can be taken as further confirmation that she has terminated the employment relationship. If there has been any misunderstanding about this, please let me know, If Mrs Danks wishes to return to her contracted role, working four days per week, then that can be considered – however my client will need to be advised of that by 5 pm Wednesday 1 June 2011 at latest.*

[72] Mrs Danks said in evidence that she was advised not to respond to the letter, and that the letter was a ploy to delay paying her annual leave. If Mrs Danks' account is true that is unfortunate advice. She should have responded. The letter was not a ploy to delay paying her annual leave and it is unfortunate if it was viewed that way.

[73] A personal grievance alleging that a dismissal occurred on 18 March 2011 was raised by letter dated 13 June 2011.

Determination

[74] I have found that no dismissal occurred on 18 March in that HAL was not responsible for Mrs Danks' departure from work and she should not have left.

[75] In the alternative the claim that Mrs Danks' employment terminated on 18 March requires a finding that date was the effective date of termination in all of the

circumstances. In turn, in order to amount to a dismissal the termination must be found to have occurred at the initiative of the employer.

[76] The only submission on behalf of Mrs Danks in this respect was that HAL dismissed her by failing to give her work after 25 March 2011. The reason for nominating that date was not explained and I assume a reference to 18 March was meant, but in any event in the circumstances I have described I do not accept there was a 'failure' to give work to Mrs Danks.

[77] Instead I find there was an agreement in principle that Mrs Danks could obtain alternative work in the short term, because of the seasonal downturn in work available to HAL. Mrs Danks left work on 18 March before advising HAL of her view that there was no work immediately available for her, or that she proposed to commence acting on the agreement in principle regarding alternative work. Any breach of obligation occurring on that day was hers.

[78] When Mrs Danks later advised she had obtained alternative work, she also advised that the work was not full time and at best left HAL with the impression that she remained available for either one or two days a week to work at HAL.

[79] HAL expected Mrs Danks to report for work accordingly, but she did not do so. However the inconsistency between the evidence of Mr and Mrs Hailes, and the generally unreliable accounts of the conversations occurring in March and April mean I am not persuaded there was any ongoing breach on Mrs Danks' part at that time.

[80] I have found that Mrs Danks was not entitled to assume from the conversation probably occurring in April that she had been replaced and her services were no longer required, and I find she should have engaged with HAL once the misunderstanding about who would take the first step regarding her resumption of work had been identified. By the same token, particularly if the workload was beginning to increase, HAL should have advised Mrs Danks of this and been more proactive in correcting the parties' misunderstanding.

[81] However when HAL confirmed to Mrs Danks on two occasions in May that her employment remained open, she should not have held to the view that her employment had already ended.

[82] I conclude that there was no failure to offer work to Mrs Danks on 18 March, and the continuing failures to offer work in March and April occurred because the parties had activated their short term agreement regarding alternative work. There was a mutual failure to communicate adequately regarding the termination of that agreement and the resumption of Mrs Danks' usual work pattern, but HAL sought to correct the failure early in May. Although it was at fault in respect of the communication difficulties to that date, so was Mrs Danks.

[83] I do not accept that these circumstances amount to a failure by HAL to offer work to Mrs Danks so that the termination of her employment occurred at its initiative. There was no dismissal.

The counterclaim

[84] There was no express term of employment regarding notice of termination. The nature of Mrs Danks' position means I accept that an implied notice period of one month is appropriate. Mrs Danks did not provide such notice.

1. Damages

[85] Damages for Mrs Danks' failure to give notice of the termination of her employment were quantified in the statement in reply as $12,375, being [37.5 hours/week x $82.50/hour] x 4 weeks. The calculation reflected an average number of hours Mrs Danks worked per week, and the difference between the rate at which she was paid and the rate at which her services were billed (being the resulting income to HAL). I did not understand that claim to have been pursued, and there will be no order for payment.

2. Penalty for breach of agreement

[86] I was not addressed on the date of termination of employment, as distinct from whether a dismissal occurred on 18 March. The termination date could arguably have been: 18 March; the date of the conversation in April; 6 May; or the result of the failure to respond to Mr Upton's letter of 30 May.

[87] As for whether the failure to provide notice should be penalised, however misguided Mrs Danks' views her departure without notice was not a wilful breach of her obligations and was affected by the inadequacies in the communications by HAL. There will be no order for the payment of a penalty.

Comment on the absence of a written employment agreement

[88] Correctly in the light of s 63A, 65(4) and 135(5) of the Employment Relations Act, no penalty was sought for the failure to provide a written employment agreement. I comment because this employment relationship problem is an example of why it is important that the requirements regarding written employment agreements be observed.

[89] Several of the difficulties experienced here would have been avoided by providing an appropriately worded agreement to Mrs Danks at the outset. I am unimpressed by the suggestion that Mrs Danks herself took pride in not signing such agreements as - even if it is true - it is no reason for the failure to make any attempt to reduce the agreed terms and conditions of employment to writing let alone offer a written employment agreement to her for signature.

Summary of orders

[90] HAL is ordered to pay to Mrs Danks:

(a) $4,445 as underpaid wages; and

(b) holiday pay on the sum of $4,445; and

(c) the course fee for the course discussed by the parties in September or October 2010, but only on the production of an invoice and evidence that the course was passed.

Costs

[91] Costs are reserved.

[92] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority