

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 249  
3087272

BETWEEN                      PETER DEAN  
Applicant

AND                              TRAVAMA HOLDINGS  
LIMITED  
Respondent

Member of Authority:        Jenni-Maree Trotman

Representatives:             Applicant in person  
Arthur Anae, on behalf of the Respondent

Investigation Meeting:      18 June 2020

Date of Determination:      25 June 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Travama Holdings Limited operates poultry farms in Tokoroa and Mangatangi. Peter Dean was employed as its Manager from 2 October 2017 until his resignation on 6 October 2019.

[2] Mr Dean alleges that he was not paid all of his holiday pay entitlements upon his termination, was not provided with a copy of an individual employment agreement (IEA), nor provided with a copy or access to his holiday and leave records. He claims recovery of his holiday pay entitlements as well as requesting the Authority to impose a penalty on Travama Holdings for its failure to provide an IEA and his holiday and leave records.

[3] Travama Holdings accepts that it did not provide Mr Dean with an IEA. However, it denies that it owes Mr Dean any money. It maintains that it has paid Mr Dean all of his entitlements.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The Issues**

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

- a. Is any holiday pay owing to Mr Dean arising out of an alleged:
  - i. Failure to pay time and a half
  - ii. Failure to pay for lieu days
- b. Did Travama Holdings fail to provide Mr Dean with an individual employment agreement as required by s 64 of the Act?
- c. Did Travama Holdings fail to provide holiday and leave records on request as required by s 82 of the Holidays Act 2003?
- d. If the answer to (b) or (c) is affirmative, should the Authority order Travama Holdings to pay a penalty?
- e. Should either party contribute to the costs of representation of the other party?

### **Issue one: Holiday pay arrears**

#### *The claim*

[6] Mr Dean said he worked on each public holiday that arose during his employment. This was made up of:

- a. Labour Day, Christmas Day and Boxing Day in 2017.
- b. New Years' Day, 2 January, Auckland Anniversary Day, Waitangi Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday, Labour day, Christmas Day and Boxing Day in 2018.

- c. New Years' Day, 2 January, Auckland Anniversary Day, Waitangi Day, Good Friday, Easter Monday, Anzac Day, Queen's Birthday and Labour Day in 2019.

[7] Mr Dean further said:

- a. The public holidays that he worked fell on days that would otherwise have been a working day for him as he normally worked every day of each week.
- b. His start and finish times fluctuated each day depending on the orders that had to be processed. However, he normally worked around eight or more hours per day.
- c. He was paid for the hours he worked on public holidays but did not receive half that amount again as required by s 50 of the Holidays Act.
- d. He did not receive alternative holidays for any of the public holidays he worked prior to his termination as required by s 56 of the Holidays Act.

#### *The response*

[8] Arthur Anae, Travama Holdings Director, said he had no idea if Mr Dean worked on any public holiday but anticipated that he did as someone had to do the work on the Farm. He said he had made no enquiries to ascertain whether Travama Holdings held any wage and time records, or holiday and leave records, but expected it did not. He thought that Mr Dean would have worked no more than 4 hours on a public holiday but was not present to confirm his hours.

#### *Entitlement to time and a half (s 50)*

[9] An employer must, at all times, keep a holiday and leave record showing the information specified in s 81 of the Holidays Act. Those persons specified in s 82 of that Act, which persons include an employee, may make requests for access to, or a copy of, these records. An employer who receives a request must comply as soon as practicable with the request by allowing the employee to view the record or providing a copy or certified extract of the information concerned.<sup>1</sup>

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<sup>1</sup> Holidays Act 2003, s 82(2).

[10] In the event that an employer fails to comply with s 81 or s 82, and that failure has prevented an employee from bringing an accurate claim, the Authority may make a finding to that effect.<sup>2</sup> In addition, it may accept as proved, in the absence of evidence to the contrary, statements made by the employee about holiday pay actually paid to the employee and leave actually taken by the employee.<sup>3</sup>

[11] Travama Holdings' failure to comply with its requirements to keep a holiday and leave record, and to provide access to those records, prevented Mr Dean from bringing an accurate claim. I accept as proved, in the absence of evidence to the contrary, the statements made by Mr Dean about the public holidays he worked, the hours that he worked on those public holidays, and the pay that he received.<sup>4</sup>

[12] Mr Dean worked on 23 public holidays. He received payment for the hours that he worked at his relevant daily pay for each day worked but did not receive half that amount again in accordance with his entitlements under s 50 of the Act.

[13] Mr Dean's relevant daily pay was \$123.28. Multiplying this sum by 23, I reach a figure of \$2,835.44. Half this amount is \$1,417.72.

[14] Travama Holdings is ordered to pay Mr Dean the sum of \$1,417.72 gross under s 50 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

*Entitlement to an alternative holiday (s 56)*

[15] I have already found Mr Dean worked on 23 public holidays. He did not receive alternative holidays for any of these days prior to his termination. Mr Dean is entitled to receive payment for these days at the rate of his relevant daily pay or average daily pay for his last day of employment.<sup>5</sup>

[16] Mr Dean's relevant daily pay was \$123.28. Multiplying this sum by 23, I reach a figure of \$2,835.44.

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<sup>2</sup> Holidays Act 2003, s 83(3).

<sup>3</sup> Holidays Act 2003, s 83(4).

<sup>4</sup> Holidays Act, ss 81-83.

<sup>5</sup> Holidays Act, s 60(2).

[17] Travama Holdings is ordered to pay Mr Dean the sum of \$2,835.44 gross under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

**Issue two: Failure to provide an individual employment agreement**

[18] The Act imposes a number of mandatory requirements that apply when parties are bargaining for individual terms and conditions in an employment agreement.<sup>6</sup> It also sets out requirements of an individual employment agreement (IEA) including that it must be in writing and contain the six pieces of information set out at s 65(2).

[19] Section 64 of the Act requires an employer to retain a copy of an IEA and, if requested by the employee, provide the employee with a copy of the IEA.

[20] An employer who fails to comply with any of the requirements prescribed by s 64 is liable to a penalty imposed by the Authority.

[21] The Statement of Problem alleged that Travama Holdings breached s 64 of the Act. Having heard from Mr Dean, and having reviewed numerous written demands for production of an IEA, I am satisfied, on balance, that Travama Holdings did breach s 64 of the Act.

**Issue three: Breach of s 82 Holidays Act - Failure to provide holiday and leave records**

[22] I am satisfied that Travama Holdings breached s 82 of the Holidays Act by failing to provide Mr Dean's holiday and leave records when requested.

**Issue four: Penalty**

[23] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty where a breach is established. These considerations include whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damage suffered by the person in breach or the person involved in the breach. In addition, the Court has set out additional

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<sup>6</sup> Employment Relations Act, s 63A.

considerations in its judgments in *Borsboom v Preet PVT Limited* and *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.<sup>7</sup>

[24] Having considered the mandatory and common law considerations, I reach the following findings:

- a. Travama Holdings' actions in failing to retain leave and holiday records, and to provide Mr Dean with access to these records, combined with its failure to provide him with an IEA, undermined the objectives of the Act. Particularly the objective to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship.
- a. There was one breach of s 64 of the Act, namely the failure to provide Mr Dean with an IEA. There was one breach of s 82 of the Holidays Act, namely the failure to provide Mr Dean with access to his holiday and leave records upon request. I do not consider these breaches are sufficiently interrelated such that it is appropriate to deal with them as one breach. The maximum total penalty available in respect of each breach is \$20,000.
- b. It is likely that Travama Holdings' breaches were intentional. This was not an isolated incident. Three other former employees gave evidence that they too were not provided with an IEA. Having heard from Mr Anae it is likely that Travama Holdings also failed to provide other employees with IEAs prior to Mr Dean bringing his claim to the Authority.
- c. Travama Holdings' was provided with multiple opportunities to produce Mr Dean's holiday and leave records both through his requests and through directions made by the Authority. Mr Anae's evidence was that he had made no attempt to seek out these records, if indeed they existed.
- d. Travama Holding's failure to provide Mr Dean with an IEA meant he did not know he had been paid incorrectly until after he resigned and was paid his final pay. In the interim, its failure to pay him the amounts due resulted in him losing the use of the money he was entitled to at the time his wages

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<sup>7</sup> *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

became due and him suffering financial hardship. Travama Holdings on the other hand has gained financially by retaining use of these monies.

- e. During the investigation meeting, Mr Anae acknowledged Travama Holdings should have complied with its obligations under the Act and the Holidays Act. However, when Mr Anae was asked if he wished to apologise to Mr Dean for the Company's breaches, he said he "could do that" but despite prompting was not willing to do so during the Authority's investigation.
- f. I am aware of no other previous similar conduct by Travama Holdings.
- g. It is important that a penalty be set at a level where it deters employers from failing to provide a written employment agreement or from failing to keep and then provide access to holiday and leave records. However, it would not be appropriate to penalise Travama Holdings so heavily that it is unable to continue to operate.
- h. There are several aggravating factors. For example, the intentional nature of the breach, Mr Dean's loss of use of the money he was entitled to at the time it became due, the length of time over which the breach occurred, and Travama Holdings' financial gain by retaining the funds.
- i. Travama Holdings did not provide any financial information to establish an ability to pay, or not to pay, a penalty. However, during questioning, Mr Anae acknowledged Travama Holdings could pay a penalty.

[25] Taking into account the foregoing, I order Travama Holdings to pay a sum of \$1,500 for each of its breaches. This sum is proportionate to the seriousness of the breaches; the harm occasioned by them, and is just in all the circumstances. In addition, these sums are consistent with penalties imposed by the Authority in similar cases.<sup>8</sup>

[26] Payment of the combined sum of \$3,000 must be made within 28 days of the date of this determination to the Employment Relations Authority.

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<sup>8</sup> *Pickering v Project Worx 2020 Ltd* [2020] NZERA 41 (s 64 (\$2,000), *McCue v O'Boyle* [2019] NZERA 648 (s 64 (\$2,000) and s 130 (\$2,000); *Snell v Carmody* [2019] NZERA 627 (s 64 (\$1,500) and s 27 of the Holidays Act (\$1,500); *Blanchard v Boyd* [2019] NZERA 122 (s 64 and s 82 Holidays Act (\$2,000).

[27] By order under s 136(2) of the Act, I order \$2,000 of the penalty to be paid to Mr Dean, once the full amount of the penalty has been recovered by the Employment Relations Authority. The other \$1,000 is to be transferred to the Crown account.

### **Costs**

[28] Mr Dean represented himself at the investigation meeting but did have the assistance of an Advocate with the preparation of his Statement of Problem. For this reason, the issue of costs are reserved aside from the filing fee that Mr Dean paid to the Authority. Travama Holdings is ordered to pay Mr Dean the sum of \$71.56 within 14 days of the date of this determination.

[29] If Mr Dean wishes to apply for legal costs, he must do so within 14 days of the date of issue of the written determination in this matter. This application may be in the form of an email. Mr Dean must ensure any application for costs includes details of the legal costs he incurred in the Authority and attaches supporting documentation such as the invoice from his Advocate and a breakdown of the Advocate's time.

[30] From service of Mr Dean's application for costs, Travama Holdings will then have 14 days to lodge any reply.

[31] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

### **Outcome**

[33] The overall outcome that I have reached is:

- a. Travama Holdings Limited must pay Peter Dean an amount of \$4,324.72 within 14 days of the date of this determination being made up of the following amounts:
  - i. \$1,417.72 gross under s 50 of the Holidays Act.

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<sup>9</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

- ii. \$2,835.44 gross under s 60 of the Holidays Act.
  - iii. \$71.56 being the Authority's filing fee
- b. Travama Holdings Limited breached s 64 of the Employment Relations Act.
- c. Travama Holdings Limited breached s 82 of the Holidays Act.
- d. Travama Holdings Limited must pay a sum of \$1,500 for each of its breaches within 28 days of the date of this determination to the Employment Relations Authority.
- e. By order under s 136(2) of the Employment Relations Act, once the full amount of the penalty has been recovered by the Employment Relations Authority, the Authority is to pay \$2,000 of the penalty to Peter Dean. The other \$1,000 is to be transferred to the Crown account.
- f. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority