

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 48A/08  
5079248

BETWEEN                      RAYMOND HARDING  
   Applicant  
  
AND                                V & A KEEFE LIMITED  
   Respondent

Member of Authority:     James Crichton

Representatives:           Robert Thompson, Advocate for Applicant  
   Michael Kyne, Advocate for Respondent

Previous Determination:   30 April 2008

Determination:              10 October 2008

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**FURTHER DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     In the substantive determination dated 30 April 2008 issued after the investigation meeting on 7 February of that year, the Authority made findings but did not determine remedies.

[2]     The reason this course of action was taken was that the respondent, as the unsuccessful party, had grave financial difficulties and it was thought that the parties might be able to negotiate a suitable settlement themselves.

[3]     In the result, there has been no agreement reached between the parties and, as leave was reserved to revert to the Authority in that event, the parties now ask the Authority to determine remedies.

[4]     There are two issues, the first relating to appropriate remedies for an unjustified dismissal, and the second relating to unpaid holiday pay.

**Holiday pay**

[5] In the substantive determination dated 30 April 2008, I concluded that the arrangements in respect of holiday pay did not comply with the Holidays Act 2003.

[6] It is helpful to briefly set out the effect of the relevant provisions in the Holidays Act. The central policy of the Act is to ensure that workers have holiday pay before they take their holiday and so s.27 provides the general principles that employers must pay their employees for annual holidays before they take them.

[7] Section 28 provides an exception to that general provision and allows holiday pay to be paid on a *pay as you go* basis provided the parties agree, there is a proper calculation of the holiday pay due, and the employee is either an *intermittent* worker or a fixed term worker working less than 12 months.

[8] In the instant case, Mrs Keefe, a director of the respondent employer, told me in evidence that she had paid Mr Harding holiday pay on precisely the same basis as he had been paid holiday pay when he worked for Mainfreight.

[9] As a matter of fact, the respondent, V&A Keefe Limited, acquired Mr Harding from Mainfreight. The evidence I heard disclosed that Mr Harding effectively had the option of remaining employed by Mainfreight or moving to V&A Keefe Limited instead. When he chose the latter, Mrs Keefe simply continued the holiday pay regime.

[10] However, the signal difficulty with the continuation of that arrangement was that the basis on which Mr Harding was employed by Mainfreight was different from the basis on which he was employed by V&A Keefe Limited. At Mainfreight, Mr Harding was a casual worker who fell within the explicit terms of s.28 of the Holidays Act 2003. When employed by V&A Keefe Limited, I am absolutely satisfied that Mr Harding was a permanent employee and was neither employed on a fixed term agreement for less than 12 months nor worked so intermittently or irregularly as to make it impossible for an employer to pay holiday pay in the usual way.

[11] It follows that, despite the evidence of agreement between the parties as to a *pay as you go* basis for holiday pay, and despite the evidence that the *pay as you go* basis suited Mr Harding, and was absolutely consistent with the arrangements he was

used to at Mainfreight, there is no legal basis for the arrangement between Mr Harding and V&A Keefe Limited and, in the absence of any agreement between the parties, I am obliged to make an order for holiday pay to be paid on a lump sum basis to Mr Harding.

### **The unjustified dismissal**

[12] In the earlier substantive determination, I made a clear finding that Mr Harding had been unjustifiably dismissed and I also determined that Mr Harding had contributed 30% by his behaviour to the circumstances giving rise to his personal grievance.

[13] I am satisfied that a proper basis for responding to Mr Harding's personal grievance is by a modest award of compensation together with a modest contribution to lost wages.

### **The employer's financial predicament**

[14] As I indicated in the substantive determination dated 30 April 2008, the evidence of the employer's financial predicament is clear indeed. Actually, the employer's financial position has worsened since the issue of the substantive determination. It was because of the employer's financial position that I tried to encourage the parties to resolve remedies by agreement.

[15] I am again encouraged by V&A Keefe Limited to effectively take judicial notice of its ability to pay. The countervailing principle is advanced by Mr Harding who simply says that he has a legal entitlement and that he should be able to obtain his determination for whatever sum or sums the Authority considers just to remedy his personal grievance.

[16] While one must have considerable sympathy for a small employer in the financial predicament that V&A Keefe Limited is in presently, the reality is that all parties to an employment relationship, whether weak or strong, whether financially well resourced or not, are obligated to use their best endeavours to comply with the normal tenets of employment law.

[17] The Authority has already found that V&A Keefe Limited has failed in that regard to dismiss Mr Harding fairly and has not complied with the Holidays Act 2003 in the treatment of Mr Harding's holiday pay.

[18] I have some genuine sympathy for the respondent employer in relation to the Holidays Act situation where it is plain that the moneys concerned have indeed been paid (and with Mr Harding's agreement), but sadly that arrangement entered into between employer and employee did not comply with the law and, in those circumstances, I hold that s.28(4) of the Holidays 2003 applies to require that the holiday pay incorrectly paid be repaid in lump sum to Mr Harding.

### **Determination**

[19] I am assisted in identifying the appropriate figures by the submissions filed on behalf of Mr Harding. I am satisfied that, in relation to the holiday pay issue, Mr Harding is entitled to a sum of \$5,463.96 gross.

[20] To remedy the unjustified dismissal which I find proved, I direct that V&A Keefe Limited is to pay to Mr Harding the following sums inclusive of Mr Harding's 30% contribution:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$1,000;
- (b) A contribution to lost wages in the sum of \$8,960 gross;
- (c) A reimbursement in the sum of \$2,240 gross for the unpaid notice period to which Mr Harding was entitled.

[21] Given the employer's financial predicament, Mr Harding will need to give V&A Keefe Limited time to pay and to that end I direct that V & A Keefe Limited shall have the ability to pay the aggregate sum awarded by equal monthly instalments over a 12 month period commencing one month from the date of this determination.

**Costs**

[22] I have decided to fix costs at this point. Mr Harding has been successful. He is entitled to a contribution towards his representation costs. V&A Keefe Limited is to pay to Mr Harding the sum of \$500 as a contribution to his costs.

James Crichton  
Member of the Employment Relations Authority