

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 186/08  
5111538

BETWEEN                      LABOUR INSPECTOR (JON  
   HENNING)  
   Applicant

AND                              ALENKA BRANDON  
   Respondent

Member of Authority:      James Crichton

Representatives:            Jon Henning in person  
   Alenka Brandon in person

Investigation Meeting:     On the papers

Determination:              9 December 2008

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1]     The applicant Labour Inspector (Mr Henning) alleges that the respondent (Ms Brandon) has failed to keep and supply wages, time and holiday records for a former employee Michelle McDonald in breach of ss.130 and 229(1)(d) of the Employment Relations Act 2000 and ss.81 and 82 of the Holidays Act 2003.

[2]     Mr Henning seeks payment of the outstanding annual holiday pay for the employee Ms McDonald in the sum of \$702.72 gross together with penalties for the statutory breaches, interest on the overdue sum and reimbursement of the Department of Labour's costs in bringing the proceeding.

[3]     The matter proceeded in the usual way with Mr Henning receiving the complaint from the former employee, making an assessment, writing to the employer Ms Brandon and seeking her response.

[4] After a protracted delay, in which there was no proper response from Ms Brandon, Mr Henning filed an application in the Authority and I convened a telephone conference on 23 October 2008 at which Ms Brandon participated. She indicated during the course of the telephone conference that she had just sent particulars to Mr Henning and disputed his assessment.

[5] Because of that intelligence, I suspended my investigation to enable Mr Henning to have the opportunity of considering the material which Ms Brandon had forwarded to him.

[6] In the result, Mr Henning has now considered that material and has not found anything in it which encourages him to reach a different conclusion from the one already reached and communicated to Ms Brandon.

[7] Notwithstanding that, Mr Henning wrote again to Ms Brandon by letter dated 1 November 2008 in which he carefully went through the elements of the former employee's claim one by one and demonstrated how the conclusion he had previously reached was indeed the correct one.

[8] Ms Brandon was given the opportunity of responding to that further letter of assessment and has not done so.

[9] When the matter was referred back to me I issued a notice of direction dated 25 November 2008 at which I directed that Ms Brandon was to have a further seven days to file a statement in reply (which she had failed to do) and to furnish me any submissions she wished to make in respect to the matter. Again, Ms Brandon has been silent.

[10] I am satisfied that the employer has had every opportunity to participate in the Authority's process and in the Labour Inspector's inquiry prior to that. I see no good reason why there should be any further delay and I intend to determine the matter on the basis of the material before me now.

### **Issues**

[11] It would be convenient to analysis the issues under the following broad headings:

- (a) Is there holiday pay due and owing?

- (b) Are penalties appropriate in this case?
- (c) Should interest be awarded?
- (d) Should the Department be able to recover its costs?

***Is there holiday pay due?***

[12] The Authority has power to consider this question by the effect of s.77 of the Holidays Act 2003. I am satisfied on the evidence before me that Mr Henning's calculations in respect to the holiday pay are accurate and that nothing Ms Brandon has provided to Mr Henning changes the conclusion.

[13] Accordingly, I am satisfied that holiday pay in the sum of \$702.72 gross is due and owing by Ms Brandon to Mr Henning for the use of the former employee Ms McDonald.

***Is this an appropriate case for the issue of a penalty or penalties?***

[14] Section 75 of the Holidays Act 2003 confers power on the Authority to grant a penalty of up to \$5,000 against an individual employer in respect of the failure to comply with any provision listed in the section. The breach by Ms Brandon (the failure to pay annual holiday pay) is one such provision.

[15] I am satisfied that this is an appropriate case for the award of a penalty and I direct that Ms Brandon is to pay a penalty to the Authority for lodging in the Crown account in the sum of \$750.

***Should interest be awarded on the unpaid wages?***

[16] The ability to award interest on the unpaid holiday pay is conferred on the Authority by s.84 of the Holidays Act 2003.

[17] The material before the Authority discloses that Ms McDonald ceased employment with Ms Brandon on 15 November 2007. That is approximately 12 months ago. I direct that interest at the rate of 5% pa be paid by Ms Brandon on the gross amount outstanding by way of unpaid annual holiday pay which is a sum of \$35.14. I direct that that amount is to be added to the gross amount of wages due and owing and the net amount after the deduction of tax is to be paid over to Ms McDonald by Mr Henning.

***Should costs be awarded?***

[18] The Labour Department has incurred a filing fee of \$70 and it is entirely appropriate that costs be fixed to enable that sum to be recovered from Ms Brandon.

[19] I direct that she is to pay Mr Henning the additional sum of \$70 in respect to the filing fee.

**Determination**

[20] Ms Brandon is to pay to Mr Henning for the use of Ms McDonald the following amounts:

- (a) Holiday pay in the sum of \$702.72 gross;
- (b) Interest on that amount of \$35.14 gross;

[21] Ms Brandon is also to pay to Mr Henning a net amount of \$70 to reimburse the Department of Labour for the Employment Relations Authority's filing fee.

[22] In addition, Ms Brandon is to pay a penalty to the Authority of \$750 such amount to be paid into the appropriate Crown bank account.

James Crichton  
Member of the Employment Relations Authority