

Issues

[5] The issues for determination are whether:

- Ms Hoffman was unjustifiably dismissed from her employment with Ms Edwards;
- Ms Hoffman was unjustifiably disadvantaged by being deprived of parental leave and payment.
- A penalty should be imposed for the failure of Ms Edwards to provide Ms Hoffman with an employment agreement;
- A penalty should be imposed for the failure of Ms Edwards to comply with s. 28 of the Holidays Act 2003.
- Ms Hoffman is owed monies as a result of being paid at a rate below the statutory minimum wage rate during the period 6 December 2011 to 24 January 2012.

Background Facts

[6] Ms Edwards explained that she had owned a farm situated in Ohaupo (the Farm) for over 14 years. The Farm has approximately 100 cows, 12 bulls, 4 pigs, 2 dogs and a cat. Ms Edwards explained that she had previously managed the Farm on her own until approximately 5 years earlier when she had started to engage seasonal temporary workers.

[7] Ms Hoffman said she had been engaged as a Casual Agricultural Employee on the Farm on 6 December 2011 following completion of a straight-to-work farming course run by Tectra Ltd.

[8] Ms Hoffman said that a written employment agreement had not been provided to her, but that the terms and conditions of employment had been agreed verbally with Ms Edwards and included:

- i. Hours of work: 6.30 a.m. to 3.15 p.m. with every second weekend off; and
- ii. Remuneration of \$500.00 gross per week plus petrol vouchers or payment on receipt of invoices of her travelling costs to and from the Farm.

[9] Ms Hoffman said that she had not lived on the Farm but had travelled daily from her home to and from the farm, a journey of some 40 minutes duration in each direction.

[10] Ms Edwards said that she had advised Ms Hoffman that as the Farm operated a schedule of once a day milking, the milking start time was 8.00 a.m. daily. At the Investigation Meeting Ms Hoffman agreed that during the initial two weeks of her employment, and following Ms Edwards return to the Farm in March 2012, her daily start time had been 8.00 a.m. daily.

[11] Ms Edwards said she had only worked with Ms Hoffman during a two week orientation period prior to having to go overseas unexpectedly due to a family illness.

[12] Prior to her departure, Ms Hoffman said she had made arrangements to provide Ms Hoffman with support during her absence, and had advised Ms Hoffman of these arrangements during a telephone conversation on Saturday 17 December 2011. Ms Hoffman said the arrangements consisted of:

- Mr Brent Carter, who had been Ms Hoffman's tutor on the straight-to-work farming course, and who was to carry out relief milking on Ms Hoffman's alternate weekends off and attend on Monday 19 December 2011 to assist Ms Hoffman;
- Ms Sarah Elliott, who was asked to oversee and manage the farm and to address any questions or issues Ms Hoffman raised with her;
- Mr John Vosper, a farming consultant, who was to advise on feed for the animals and assist with plate measurement of the fields;
- Ms Joanne Petrie who was to be available to assist; and
- Various neighbours who had agreed to help Ms Hoffman should she require assistance.

[13] Ms Hoffman said she had asked her partner, Mr Colin Mathis, to help her on Monday 19 December 2011, and although Mr Carter had arrived at the Farm; this had not been until after 10.00 a.m. when the milking had been completed.

[14] Ms Elliott, a dairy farmer with 25 years experience, said she had handled financial matters for Ms Edwards for a number of years, and was responsible for the payment of Ms Hoffman's wages.

[15] Ms Elliott said she had visited the Farm in early January 2012 when she had introduced herself to Ms Hoffman. At that time Ms Elliott said Ms Hoffman had informed her that the arrangement with Mr Carter had not been successful and had asked her if Mr Peter Monk, a family friend of Mr Mathis, could assist her in place of Mr Carter.

[16] Ms Elliott said she had spoken to Mr Monk and then discussed the possibility of his employment with Ms Edwards who had agreed to it, and accordingly Mr Monk had been engaged to assist Ms Hoffman and to provide cover for her alternate weekends off work.

[17] Ms Hoffman said that as she was carrying out the milking duties on her own, she decided to start her working day at 5.30 a.m. instead of 8.00 a.m., although she did not discuss this alteration with Ms Edwards.

[18] Ms Elliott said that she had instigated the introduction of a Wages Book in respect of Ms Hoffman's payments, and had taken it to Ms Hoffman and explained the make-up of her pay to her so that she would understand that she was receiving holiday pay, how she was being taxed, that she had been paid for the extra days off she had taken, was paid whilst off sick, and paid time and a half for working on statutory holidays. Ms Elliott said Ms Hoffman had signed the Wages Book in front of her each week until Ms Edwards' return.

[19] Ms Elliott said that Ms Hoffman had received annual holiday pay at the rate of 8% together with her weekly pay in accordance with Ms Edwards' instructions.

[20] Ms Elliott said that she had been concerned that the weekly payment to Ms Hoffman did not accord with the statutory minimum hourly payment rate at that time and she had discussed this with Ms Edwards who had agreed to increase the weekly rate paid to Ms Hoffman to \$600.00 gross per week

[21] On 24 January 2012 Ms Hoffman said that she had been advised that her weekly rate of pay had been increased, and she had understood the increase to be based upon her performance.

[22] Ms Edwards said that although an increase based on performance had been discussed at Ms Hoffman's interview, the increase on 24 January 2012 was based on the recommendation made by Ms Elliott relating to the statutory minimum wage rate, and was not performance related because, as a result of her absence, she had been unable to assess Ms Hoffman's performance.

[23] Ms Hoffman said that on or about 24 January 2012, she and Ms Edwards had spoken by telephone and she had been offered, and had accepted, employment for the 2012 – 2013 farming season which would commence on 1 June 2012 following the end of the 2011 -2012 farming season on 31 May 2012.

[24] Ms Edwards agreed that she had spoken to Ms Hoffman about continuing in employment at the Farm for the 2012 – 2013 farming season; however she said Ms Hoffman could not have accepted an offer of continuing since one had not been made.

[25] Ms Edwards said that during the telephone conversation she had enquired if Ms Hoffman would be interested in staying on for the 2012 – 2013 farming season and had explained that if she accepted to continue in employment, this would involve her living at the Farm for the calving season during July to September, and that weekends off would change to every third weekend due to the nature of the work necessary during the calving season.

[26] Ms Edwards said it had been agreed between them that Ms Hoffman was to discuss the proposal with Mr Mathis and to let her know her decision, however Ms Edwards said that there had been no further discussion on the subject.

Pregnancy advice

[27] Ms Hoffman said she had contacted Ms Edwards on 14 March 2012 to update her regarding the Farm, and had also advised Ms Edwards that she was pregnant and that the expected delivery date was 13 November 2012. Ms Hoffman said that Ms Edwards had not seemed pleased by the news.

[28] Ms Edwards agreed that following the advice that Ms Hoffman was pregnant it had become an awkward conversation. Ms Edwards said she had remarked to Ms Hoffman that “*You are so young*” and that she had ended the conversation by saying that she could not be happy about the situation.

[29] Ms Edwards said that there had been no conversation about how long Ms Hoffman intended to work until the due delivery date of the baby, or about an intention to continue working after the birth.

[30] At the Investigation Meeting Ms Hoffman withdrew the part of her written statement in which she had stated that she had informed Ms Edwards that she had wanted to continue working until a month before the babies were due to be born, and then return to work the next season. Ms Hoffman confirmed when questioned that she had been intending to finish her employment at the Farm at the end of the current farming season.

Job interview

[31] Ms Elliott said that in late February or early March 2012 Ms Hoffman had told her that she wanted to look for work closer to home, and they had discussed this. Ms Elliott said she had advised Ms Hoffman that she could make enquires of Mr Mathis's employer, also a farmer, look on the Fencepost website, and look in the newspapers for employment vacancies.

[32] Ms Elliott said that Ms Hoffman had taken leave to attend a job interview in Wellington on 9 March 2012 with a company with whom she had previously undertaken travel and flight attendance training, and arrangements had been made for Mr Monk to cover her duties whilst she was away.

[33] Ms Elliott said that on either 13 or 14 March 2012 Ms Hoffman had told her she had been offered and accepted the job offer based in Wellington. Ms Elliott said she had advised Ms Hoffman to contact the company and advise it that she was pregnant, and Ms Hoffman had subsequently told her that after she had done so, the job offer had been withdrawn.

[34] Ms Hoffman explained that she had been contacted by the company in Wellington in connection with an employment position; however she had subsequently not accepted the job offer as she had decided she wanted to stay in farming.

[35] Following the interview in Wellington, Ms Elliott said that she had asked Ms Hoffman if she was intending to continue working for Ms Edwards and Ms Hoffman had replied that she intended to finish the season on 31 May 2012, but not to continue to work the next farming season.

[36] Mr Vosper said he had attended the Farm approximately every 10 days during the period when Ms Edwards had been in Canada, and during that time he and Ms Hoffman had discussed the job interview she had had in Wellington.

[37] Mr Vosper said that he had gained the impression that Ms Hoffman intended to leave the Farm. At the Investigation Meeting Ms Hoffman agreed that during these discussions she may have given Mr Vosper the impression that she wanted to leave the Farm.

AgITO farming course

[38] Ms Elliott said she and Ms Hoffman had discussed the possibility of Ms Hoffman enrolling on an AgITO farming course, and Ms Hoffman had provided her with the details of this course. Ms Elliott said she had spoken about this possibility to Ms Edwards who had agreed to pay the course fees, and she therefore had made the payment to AgITO on Ms Edward's behalf.

[39] Ms Eleri Williams, a Training Advisor for AgITO, said she had enrolled Ms Hoffman on an AgITO course due to commence in March 2012, however she had subsequently heard from Ms Hoffman who had advised that she was withdrawing from the course.

[40] Ms Williams said she had emailed Ms Elliott to advise on the refund of the course fees. The email dated 12 March 2012 stated:

Hi Sarah,

I have received a call from Leanne informing me of her change of career. I have registered a refund which I have to have this authorised by my manager. I will need an account number to refund the course fees.

[41] Ms Williams said she had had a short conversation with Ms Hoffman about her decision, and Ms Hoffman had told her that she was going back to a career in tourism.

[42] Ms Karina Burman said she and her husband had met with Ms Hoffman at the end of March 2012 to discuss a position they had available on their farm for the 2012 – 2013 farming season and for which Ms Hoffman had applied.

[43] Ms Burman said Ms Hoffman had told them that she was looking for a milking position closer to her home for the next farming season. Ms Burman said Ms Hoffman had been unsure of the terms of her employment with Ms Edwards, but had explained that she thought her employment would finish when the cows became dry.

[44] Ms Burman said that because Ms Hoffman had told them that she was pregnant, no job offer had been made as they had concerns from a health and safety perspective about being able to provide Ms Hoffman with a safe work place.

Events post 1 April 2012

[45] Ms Edwards said she had returned to New Zealand and the Farm on 1 April 2012, and that she had been very pleased at the state of the Farm and the way in which it had been run by Ms Hoffman in her absence.

[46] On 3 April 2012 Ms Edwards said she and Ms Hoffman had been working together plate metering and they had a discussion about Ms Hoffman's pregnancy as she had been

informed by her neighbours that Ms Hoffman had been expecting twins which she had not previously known.

[47] Ms Hoffman claimed that Ms Edwards had told her she was too young to be a mother and that after she had had the twins she would never return to farming. Ms Hoffman said she had disputed that and said that she would find a way of combining family responsibilities with a farming career.

[48] Ms Edwards said that she had enquired how long Ms Hoffman intended to continue to work and she had told her until the end of the season. Ms Edwards said she had asked if that meant to 31 May 2012, and Ms Hoffman had confirmed that this was correct. Ms Edwards said she had then informed Ms Hoffman that she would start the process to recruit someone to replace her.

[49] Ms Hoffman said that she had felt Ms Edwards' attitude towards her had changed once she had learnt that she was pregnant, and that she had criticised and ridiculed her method of working and some of the decisions she had made concerning the cows during her absence.

[50] Ms Edwards said that Ms Hoffman had been rude and uncooperative following her return to the Farm, and that she had been concerned that Ms Hoffman had been feeling unwell due to her pregnancy from her body language and comments.

[51] Ms Hoffman said she had repeatedly asked Ms Hoffman for copies of medical advice from her doctor or midwife so she could ensure that the tasks she gave her to do would be within her capacity; however Ms Hoffman had not provided any information.

[52] Ms Hoffman said she had asked the midwife for such medical information; however she had been told that there were no problems with the work she was expected to do.

[53] Ms Edwards said that on Saturday 21 April 2012 she had received a text message from Ms Hoffman to the effect that her weekly pay had not been paid into her bank account. Ms Edwards said she had telephoned the bank to check, however a telephone message had informed her that she would have to call back on Monday.

[54] Ms Edwards said she had texted Ms Hoffman and explained that she did not understand why this had occurred and that she had not been able to contact anyone at the bank.

[55] Following this Ms Edwards said she had then telephoned Ms Elliott who had checked her account on the internet and confirmed that the monies had been transferred from Ms Edwards' account.

[56] On the evening of Sunday 22 April 2012 Ms Edwards said she had received a telephone call from Mr Mathis who had asked why Ms Hoffman had not been paid, and had also said that Ms Edwards owed Ms Hoffman two weeks payment in respect of annual leave entitlement.

[57] Ms Edwards said she had explained that Ms Hoffman had been paid holiday pay at the rate of 8% of her salary on a weekly basis, and said that Mr Mathis had queried whether or not this had been in Ms Hoffman's employment agreement.

[58] The following day, 23 April 2012, Ms Edwards said she had met with Ms Hoffman and shown her the Wages Book and pointed out that she had been paid holiday pay entitlement each week.

[59] On 7 May 2012 Ms Hoffman said she had been asked to Ms Edward's house for a meeting. In her witness statement Ms Hoffman stated that there had been a discussion about her providing medical evidence and that the meeting had concluded with Ms Edwards telling her that she was to finish employment at the end of the week, however at the Investigation Meeting Ms Hoffman said that she could not remember the conversation.

[60] Ms Edwards said that because Ms Hoffman had told her regularly that she could not carry out the tasks asked of her due to her pregnancy, but had not provided any medical information; she had telephoned the Department of Labour for advice. Ms Edwards said she had been advised that she was entitled as the employer to have medical information and to hold a meeting with Ms Hoffman for this purpose.

[61] Ms Edwards said that she had asked Ms Hoffman into her house for a meeting on 7 May 2012 and that Ms Hoffman, who had been absent from 2 May to 7 May 2012, had provided her with a medical certificate.

[62] Ms Edwards said they had then had a discussion about how Ms Hoffman was feeling and coping as a result of which she had suggested that Ms Hoffman just carry out light duties and finish at the end of that week, to which Ms Hoffman had agreed.

[63] Ms Edwards said that she had not considered she had dismissed Ms Hoffman, but that it had been a mutual agreement that Ms Hoffman finish at the end of that week.

[64] In her witness statement Ms Hoffman stated that on 8 May 2012 there had been a heated discussion during which Ms Edwards had continually criticised her and had told her: "*Today is your last day here!*", however at the Investigation Meeting Ms Hoffman said she could not remember what had happened on that day.

[65] Ms Edwards said that from the commencement of the day on 8 May 2012 Ms Hoffman had been argumentative and had refused to do the light tasks she had asked her to do. As a result, Ms Edwards said she had not wanted Ms Hoffman to be at work any longer and informed her that that day, 8 May 2012, would be her last day.

[66] Ms Hoffman confirmed that she had not returned to the Farm after that date.

Determination

Was Ms Hoffman unjustifiably dismissed from her employment with Ms Edwards?

[67] Ms Edwards said that she had employed Ms Hoffman as a casual agricultural employee. The IRD website defines a casual agricultural employee:

Casual agricultural workers are people who are engaged in casual seasonal work:

- *On a day-to-day basis*
- *For up to three months*

They are taxed through the PAYE system at a flat rate.

[68] Given the nature of Ms Hoffman's employment which exceeded a period of three months, and incorporated an understanding that there would be regular daily attendance during that period, apart from the scheduled alternate weekend leave, I find that Ms Hoffman was a permanent employee.

[69] As a permanent employee, the decision to dismiss Ms Hoffman must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

- ii. *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[70] During the Investigation Meeting I found Ms Hoffman's evidence to have been unreliable and at times to contradict what had been stated in her witness statement. However on the basis of the evidence supplied by Ms Edwards, I find that Ms Hoffman's employment had been terminated by Ms Edwards following the conversations which took place on 7 and 8 May 2012.

[71] The termination of employment followed a discussion with Ms Edwards which Ms Hoffman described as 'heated' in her witness statement, although when questioned at the Investigation Meeting she could not recollect any details of the discussion.

[72] Although Ms Edwards denied that there had been a heated conversation, I consider from her evidence that she had been becoming frustrated by Ms Hoffman's complaints that she could not carry out assigned tasks due to her pregnancy, and by what she understood to be Ms Hoffman's continued refusal to provide her with medical advice on the tasks Ms Hoffman could safely carry out whilst pregnant.

[73] On this basis I consider it more likely than not that the discussions on 7 and 8 May 2012 had been somewhat tense, indeed Ms Edwards said that she had not wanted Ms Hoffman to be at work any longer and informed her that 8 May 2012 would be her last day.

[74] I find that Ms Edwards terminated Ms Hoffman's employment on 8 May 2012 rather than it having been a mutual decision that Ms Hoffman's employment would terminate at the end of that week, i.e. on 13 May 2012.

[75] I do not find any substantive justification for the dismissal, and further I find that the termination of Ms Hoffman's employment had not been preceded by any acceptable procedural steps to make her aware that Ms Edwards had any concerns regarding her performance as is expected of the fair and reasonable employer.

[76] I determine that Ms Hoffman was unjustifiably dismissed by Ms Edwards.

Remedies

[77] Ms Hoffman has been unjustifiably dismissed and is entitled to remedies.

Unjustifiable Dismissal

Lost wages

[78] Ms Hoffman had claimed that she had understood her employment to have been continuous following her acceptance of the offer of employment for the 2012 – 2013 farming season made during a telephone conversation with Ms Edwards.

[79] Ms Edwards' evidence was that whilst there had been a suggestion that Ms Hoffman consider working the 2012 – 2013 farming season, an offer had neither been made nor accepted, and that Ms Hoffman's intention had been to leave her employment at the Farm at the end of the season for which she had originally been employed, that is on 31 May 2012.

[80] I find that this intention was not only confirmed by the evidence of Ms Elliott, Mr Vosper, Ms Williams and Ms Burman, but also by Ms Hoffman herself at the Investigation Meeting.

[81] On this basis I find that it was Ms Hoffman's intention that her employment would have ended on 31 May 2012.

[82] I order Ms Edwards to pay Ms Hoffman the sum of \$2,200.00 gross (calculated as 2 pay periods from the date of the last normal payment made to Ms Hoffman on 4 May 2012, less \$200.00 paid on 15 May 2012) in respect of lost wages for the period from 8 May 2012 until 31 May 2012.

Interest

[83] Ms Hoffman has applied for interest on the lost wages award.

[84] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum¹.

[85] I consider that it is appropriate that Ms Edwards is ordered to pay interest on the lost wages amount owed to Ms Hoffman.

¹ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[86] **I order Ms Edwards to pay interest at the rate of 5% on the outstanding amount of \$2,299.00 due to Ms Hoffman until such amount is paid.**

Compensation pursuant to s 123(1) (c) (i) of the Act

[87] Ms Hoffman said that she had been upset, stressed, and having arguments with Mr Mathis following the termination of her employment at the Farm.

[88] Given that Ms Hoffman intended to finish her employment on 31 May 2012 and had been seeking alternative employment prior to the termination of her employment at the Farm, I find that any upset could have arisen only from any disagreement or argument with Ms Edwards on 7 or 8 May 2012 and not from the contemplated future loss of employment.

[89] I note that at the Investigation Meeting Ms Hoffman could not recall any details of these discussions, and consequently I am not persuaded that any upset was significant.

[90] In regards to stress and the arguments with Mr Mathis, I note from Mr Mathis' evidence that the pregnancy had been unplanned and that this had caused stress between them.

[91] In these circumstances I consider that a minimal award for compensation is merited.

[92] **I order Ms Edwards pay Ms Hoffman the sum of \$1,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**

Contribution

[93] I am required under s 124 Employment Relations Act 2000 to consider the issue of any contribution that may influence the remedies awarded. I note the comments made by Ms Edwards that Ms Hoffman had been difficult to manage on her return from Canada. However I also take into consideration Ms Edwards' evidence that she had been very satisfied with Ms Hoffman's work during the period of her absence, and Ms Hoffman's youth and inexperience at the time of her employment with Ms Edwards. There is to be no reduction in remedies.

Was Ms Hoffman unjustifiably disadvantaged by being deprived of parental leave and payment?

[94] Section 7 of the Parental Leave and Employment Protection Act 1987 (PLEPA) sets out the terms on which a female employee may be entitled to take parental leave:

Except as otherwise provided in this Act, every female employee –

(a) who becomes pregnant; and

(b) who, at the expected date of delivery, will have been in the employment of the same employer for at least an average of 10 hours a week over –

(i) the immediately preceding 12 months; or

(ii) the immediately preceding 6 months, -

shall be entitled to maternity leave in accordance with this Act.

[95] To be eligible for parental leave and as a consequence be entitled to parental leave entitlements Ms Hoffman was required to be an employee. Unless employed, Ms Hoffman was not eligible to take parental leave in accordance with the PLEPA.

[96] Ms Hoffman's employment was unjustifiably terminated on 8 May 2012, however even if it had not been, her employment would have ended on 31 May 2012. The expected due date of delivery for Ms Hoffman was advised to be in November 2012, and consequently she would not have been employed by Ms Edwards in the immediately preceding six months prior to the expected date of delivery.

[97] I determine that Ms Hoffman was not an eligible employee for the purposes of s7 PLEPA, and thus was not eligible to take parental leave under the PLEPA or entitled to parental leave entitlements.

[98] I determine that Ms Hoffman was not unjustifiably disadvantaged by being deprived of parental leave and payment.

Should a penalty be imposed for the failure to provide Ms Hoffman with an employment agreement?

[99] Ms Edwards stated that due to her sudden and unexpected departure for Canada, she had not had time to do paperwork and issue Ms Hoffman with an employment agreement.

[100] On the basis that Ms Edwards confirmed at the Investigation Meeting that she had not issued an employment agreement to previous employees, I am not persuaded that she had intended to issue an employment agreement to Ms Hoffman, and there is no evidence that she took any steps to rectify the situation either when in Canada or upon her return.

[101] Ms Hoffman was young and naive at the time of her employment with Ms Edwards. The employment at the Farm had been her first employment after having completed the

straight-to-work farming course. It is clear from the evidence of Ms Burman that Ms Hoffman had been unclear about the terms of her employment.

[102] The then Chief Judge Goddard considered the question of whether or not to award penalties in the Employment Court case *Xu v McIntosh*², and observed that there are three issues to be considered:

- i. *How much harm has the breach occasioned?*
- ii. *How important is it to bring home to the party in default that such behaviour is unacceptable?*
- iii. *Was the breach technical and inadvertent or was it flagrant and deliberate?*

[103] I find that Ms Hoffman did suffer a disadvantage as a result of not being provided with an employment agreement, in that she was placed in a position of uncertainty regarding her terms of employment.

[104] I find that the breach to have been deliberate. Ms Edwards was required to provide Ms Hoffman with an employment agreement in accordance with the legislative requirements. I consider that public policy considerations require employers to act responsibly in adhering to statutory imperatives.

[105] Ms Edwards is ordered to pay a penalty of \$1,000.00 for the non-provision of an employment agreement to Ms Hoffman

[106] In the circumstances I consider it appropriate that a proportion of the penalties be paid to Ms Hoffman.

[107] Ms Edwards is ordered to pay a penalty of \$1,000.00, of which \$500.00 is to be paid to Ms Hoffman, and \$500.00, to be paid to the Crown.

Should a penalty be imposed for the failure to comply with s.28 of the Holidays Act 2003?

[108] Section 28 of the Holidays Act 2003 outlines the circumstances under which annual holiday pay can be paid with an employee's normal pay as being if the employee is a fixed term employee for a period not exceeding 12 months or engaged on an intermittent or irregular basis.

² [2004] 2 ERNZ 448

[109] Since I have found that Ms Hoffman was a permanent employee neither of these situations applies to Ms Hoffman, who should not therefore have been paid holiday pay on a 'pay-as-you-go' basis. However I find that as Ms Hoffman has been paid her full entitlement to holiday pay, she has suffered no disadvantage as a result.

[110] I further find that the breach of clause 4 was neither flagrant nor deliberate³. It was of the nature of a technical breach only and I award no penalty.

Is Ms Hoffman owed monies as a result of being paid at a rate below the minimum wage rate during the period 6 December 2011 to 24 January 2012?

[111] Ms Hoffman confirmed that her working hours had been agreed as from 8.00 a.m. to 3.15 p.m. daily with every alternate weekend off, and that she had been paid at the rate of \$500.00 per week, and payment was made fortnightly. Therefore for this calculation I have taken that in a nominal 14 day paid working cycle Ms Hoffman worked for 12 days and was paid \$1,000.00.

[112] I calculate Ms Hoffman's nominal working hours to be 6 hours 45 minutes, being 7 hours 15 minutes per day minus a 30 minute unpaid meal break in accordance with s 69ZD (4) of the Act. Over the two weekly working cycles Ms Hoffman worked 81 hours and was paid \$1,000.00 producing an hourly rate of \$12.36 during the period 6 December 2011 to 24 January 2012. For the purposes of this calculation, I find Ms Hoffman was paid an hourly rate of \$12.36.

[113] Ms Hoffman should have been paid at a rate of \$13.00 per hour which was the statutory minimum hourly wage rate during that period; however her hourly rate fell short of this rate by \$0.64 per hour.

[114] I order that Ms Edwards pay Ms Hoffman the sum of \$311.04 (calculated as 6 weekly pay periods x 81 hours at \$0.64 per hour. I have ignored any statutory days worked as I consider this be *de minimus*) in respect of the shortfall in the statutory minimum wage rate to which she was entitled during the period 6 December 2011 to 24 January 2012.

³ *Xu v McIntosh* [2004] 2 ERNZ 448, per Goddard j at para 48

Costs

[115] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority