

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 219/10
5130867

BETWEEN J.S. SANSON LIMITED
Applicant

AND ALAN REID (LABOUR
INSPECTOR)
Respondent

Member of Authority: Vicki Campbell

Representatives: Justin Sanson for Applicant
Alan Reid for Respondent

Investigation Meeting: 7 May 2010 at Hamilton

Determination: 11 May 2010

DETERMINATION OF THE AUTHORITY

[1] J.S. Sanson Limited was served a demand notice pursuant to s 224 of the Employment Relations Act 2000 by Mr Alan Reid, a Labour Inspector, on 18 February 2009. The demand notice required J.S. Sanson Limited to pay \$880.00 in holiday pay to its former employee Ms Catherine Eynon. J.S. Sanson Limited objects to the issuing of the demand notice.

[2] Pursuant to s 226 the Authority is to determine whether or not the whole or any part of the wages or holiday pay or any other money specified in the notice is due to the employee by the employer and, if so, the amount payable.

[3] J.S. Sanson Limited contends that holiday pay is not owed because irrespective of the number of hours Ms Eynon worked each week she was paid \$400 nett and that during her employment she received payment for hours which she did not work. Mr Sanson says that these hours ought to be deducted from any holiday pay owing.

Background

[4] Mr Sanson owns and operates a diary farm. Ms Eynon, who was a friend of Mr Sanson's, was employed as a Farm Hand in July 2006. Mr Sanson says he agreed to pay Ms Eynon \$400 nett per week so that she could meet her mortgage commitments. Ms Eynon signed a written employment agreement in April 2006. That agreement provided for the \$400 nett payment per week plus a clause which required Ms Eynon to work 60 hours each fortnight.

[5] The agreement also states that any hours worked over 60 hours per fortnight shall be replaced in lieu during the year. Mr Sanson confirmed at the investigation meeting that this meant Ms Eynon could take equivalent time off in lieu of time worked in excess of 60 hours in a fortnight.

[6] The Authority has reviewed a spreadsheet of hours kept as a record of the actual hours worked by Ms Eynon as required by the employment agreement. It is obvious that on a number of fortnightly periods, as anticipated by the employment agreement Ms Eynon worked in excess of 60 hours. Those hours were "banked" and were then available for Ms Eynon to take during her employment as time in lieu.

[7] It is equally obvious that there were fortnightly periods where Ms Eynon did not work the required 60 hours.

[8] Over the entire period of her employment I have calculated Ms Eynon took 126.99 hours off work more than she had banked, and for which she received payment. The employment agreement does not specify what is to happen in that situation. Mr Sanson seeks to have the Authority make a deduction from Ms Eynon's holiday pay to compensate him for paying Ms Eynon for time she did not work but for which Mr Sanson paid her. There are some difficulties with that approach not least of which is that there is no record as to the reasons why Ms Eynon did not work the required hours. At the investigation meeting Mr Sanson told the Authority that some of the hours were not worked as there was no work to be undertaken, while others were not worked because Ms Eynon simply failed to turn up for work.

[9] It is not uncommon for employment agreements to provide for wages to be the subject of a "rateable deduction" for time lost by the "default" of the employee. Such a provision allows deductions from the weekly rate where an employee is in default due to not turning up for work or leaving work early. The employment agreement

entered into by Ms Eynon did not provide for such a clause, therefore there is no legal basis on which Ms Eynon's weekly rate of \$400.00 could be subject to any deductions. It follows there is no basis on which the Authority can do as Mr Sanson asks.

[10] The record shows that Ms Eynon took six complete weeks off work during her employment. The Labour Inspector in his demand notice recognised five of those six weeks as holidays but does not appear to have taken into account the additional week Ms Eynon did not work during the week of 20 January 2008. In the absence of any evidence to the contrary, I have concluded that Ms Eynon took this week off as paid leave.

Determination

[11] Upon reviewing all the evidence and the information provided to the Authority, I find Ms Eynon is owed holiday pay. The objection to the demand notice fails with the exception that the week's leave taken by Ms Eynon in January 2008 be deducted from the amount specified in the demand notice.

[12] Accordingly, the demand of the Inspector now becomes the order of the Authority. Under s 226 of the Act, J.S. Sanson Limited shall pay to Catherine Eynon holiday pay owed under the Holidays Act 2003 in the sum of \$480.00. I order payment to be made by the employer to Ms Eynon within 28 days of the date of this determination.

[13] Given the modicum of success by both parties to this application there will be no order for costs which shall lie where the fall.

Vicki Campbell
Member of Employment Relations Authority