

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 107/08
5090692

BETWEEN PAUL JANOVEC and JANA
 BERANKOVA
 Applicants

AND COWES BAY ESTATE
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicants in person
 Rick Johnston for Respondent

Investigation Meeting: 19 March 2008 at Auckland

Determination: 25 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Applicants seek orders for payment of holiday pay, additional weekend hours, public holidays and days in lieu. They worked as caretakers of the Respondent's property and animals on Waiheke Island between 16 October 2006 and 31 May 2007.

[2] The Respondent does not deny that some pay is owing to the Applicants, but say amounts due are subject to deductions for (i) power use in a house provided as accommodation for the Applicants, (ii) days off taken by the Applicants and (iii) cleaning the house after it was vacated by the Applicants on 2 June 2007. The Respondent does not accept the additional weekend hours, public holidays and lieu days claimed by the Applicants.

[3] The Applicants first raised their claim with a Labour Inspector in June 2007. The Inspector wrote to the Respondent but the matter was not resolved. The

Applicants lodged their claim in the Authority on 19 September 2007 and, after the Respondent lodged a statement in reply, the matter was referred to mediation on 23 October 2007. Despite efforts by the Mediation Service between then and 12 February 2008, the Respondent did not agree to attend mediation either in person or by telephone conference.

[4] I understand the company's directors, Sean Donnelly and Beverley Donnelly, are absent from New Zealand for much of each year and this was the reason that the Applicants were employed as caretakers at the Respondent's large Waiheke property. However, Mrs Donnelly was in New Zealand in February 2008 and did not make herself available for mediation on this issue, either in person or by telephone.

[5] Because of lack of progress with mediation, an Authority directions conference was held by telephone conference with the parties on 25 February 2008. The matter was set down for investigation. Arrangements made for the Respondent's company accountant, Mr Johnston, to attend on the Respondent's behalf.

[6] Shortly after, I declined an application by the Respondent for postponement of the notified investigation meeting until mid-April, so that Mrs Donnelly could attend during a visit to New Zealand. I declined because of the delays already occasioned by the Respondent's continual unavailability for mediation (even by telephone) and because I was satisfied that the Respondent had been given ample opportunity to attempt to resolve the matter earlier, provide all necessary information for the Authority's investigation and make arrangements for its representation at the investigation meeting.

[7] I am satisfied, largely on the basis of information and documents provided by the Respondent, that the Applicants are entitled to an order for annual leave, additional weekend hours, and additional pay for public holidays and days in lieu to be paid without deductions that the Respondent alleges it is entitled to make from payments due. The remainder of this determination sets out my findings on those entitlements and reasons for them and summarises the amounts owing to the Applicants.

Employment agreement

[8] The Employment Relations Act 2000 ("the ER Act") s65 requires terms and conditions of employment to be recorded in writing and agreed by the parties.

[9] The Applicants did not have a written employment agreement at the time of starting work in mid-October 2006. Rather, they said in affirmed evidence which I accept, that they were employed on oral terms including at an annual salary of \$30,000 each for work between 8am and 5pm Monday to Friday. A house was provided for their accommodation without rental or other charge.

[10] In December 2006, the Applicants were presented by Mrs Donnelly with a document headed with the word “*Contract*” and setting out over 19 pages an extensive list of duties for the maintenance of the property, its grounds and its animals, comprising three dogs, two cats and two horses. Although that document says nothing about the wages to be paid for the work nor problem resolution procedures – both omissions in breach of s65 of the ER Act – it does state the following relevant terms (at least as seen by the Respondent):

- (i) “*A diary must be kept for all daily activities ...[of] ... work carried out during day*”; and
- (ii) “*Hours of work Monday to Friday, 8am to 5pm*”; and
- (iii) “*Saturday and Sunday one hour morning and night to attend to all animals when owners are not here. These hours will be reimbursed with additional leave with pay*”; and
- (iv) “*At no time is place to be left unattended. Someone must stay for security purposes and for the animals’ welfare ...*”; and
- (v) “*Power will be charged to employees and allowance will be given for the cooking of any animals’ meals and any laundry that is required in the owners’ absence*”.

[11] The applicants did not sign this “*Contract*” or otherwise indicate agreement to it.

[12] Another relevant indication of the Respondent’s view of the terms of its employment of the Applicants is found in a letter of the Respondent to the Authority dated 22 October 2007 (“the 22 October letter”) which states, amongst other things, that the Applicants were not required to work full time on public holidays or weekends, but that “*it was clearly pointed out that we would reimburse them for two*

hours each for these days, taking into consideration the time required for them to feed and walk our animals.”

Annual leave

[13] The Respondent calculates that the Applicants are each entitled to \$1,556.50 in holiday pay on the basis of having worked 1,248 ordinary hours over a period of seven months and two weeks.

[14] The Applicants' salary divided by the expected ordinary hours of work gives an hourly rate of \$14.42. Using that hourly rate and the total ordinary hours accepted by the Respondent gives total earnings of \$17,996.16. Eight percent of that amount is \$1,439.69. The Applicants accept that is the amount they are owed as holiday pay on their earnings for ordinary hours.

Weekend work

[15] The Respondent calculates that the Applicants are owed an additional 20 hours of ordinary pay for additional hours worked on weekends when the owners were absent. The Applicants dispute that figure and say that they worked on 18 weekends. They claim the four hours for each of those weekends as the time that the 22 October letter stated they would be paid for.

[16] In the absence of better information, I accept the Applicants' evidence on the number of weekends worked and the Respondent's statement of the extent of payment that would be made for those weekends. Based on the hourly rate of \$14.42 and the total of 72 hours (18 weekends x 4 hours), the total owed to the Applicants under this heading is \$1,038.24.

[17] They are also entitled to holiday pay on that amount at 8%, that is \$83.05.

Public holidays

[18] The Respondent agreed to pay the Applicants for two hours work on public holidays (the 22 October letter refers). Eight public holidays occurred during the Applicants' employment. For those days, they received their ordinary daily pay in their usual wages that were paid monthly by direct credit. However, under s50 of the Holidays Act 2000, the Applicants were entitled to time-and-a-half for hours worked on those public holidays. Accordingly, they are entitled to additional public holiday

pay of half their usual hourly rate for 16 hours. That totals \$115.36.

[19] The Respondent objects that no actual work is recorded in the work diary for the hours claimed on each of the eight public holidays, but I accept the Applicants' evidence that they did not record the routine work of feeding and walking the animals on those days. This was accepted in the Respondent's letter of 22 October 2007 when it said that two hours would be paid for each of those days and no objection was taken at that stage to whether or not there was any particular tasks recorded in the work diary on those days.

Lieu days

[20] Section 56(1)(b) of the Holidays Act provides that an employee is entitled to another day's holiday (an alternative holiday) instead of a public holiday if he or she works (in accordance with his or her employment agreement) **on any part** of that day.

[21] The 22 October letter accepted that the Applicants would be working for some hours – only two – on public holidays. That was the Respondent's understanding of its employment agreement with the Applicants. Accordingly, the Applicants are entitled to the lieu day (alternative holiday) for each public holiday on which they worked part of the day, as provided for by the Holidays Act. Section 60 of the Act requires the employee to be paid their relevant daily pay for the day that is taken as the alternative holiday. Alternative holidays not taken before an employee's ends are to be paid at the rate of the employee's relevant daily pay for the last day of employment.

[22] On that basis, the Applicants are entitled to pay for a further eight lieu or alternative holidays. Calculated on the basis of 64 hours, this totals \$922.88.

Deductions

[23] The Respondent worked out wages owing on the basis that it is entitled to deduct \$902.82 for its calculation of power used by the Applicants in their accommodation. It also seeks to deduct a further \$200 from the wages owed to each Applicant for what it says was the cost of cleaning the house, oven, dishwasher, cupboards, bathroom, laundry, external bins and external areas after the Applicants vacated the house on 2 June 2007.

[24] Sections 4 and 5(1) of the Wages Protection Act 1983 provides that no deductions may be made from wages payable to a worker without the worker's written consent. In the present case, the Applicants did not have a written employment agreement (in breach of s65 of the ER Act) and had given no written consent for deductions from the wages.

[25] The Applicants say their oral terms of employment provided for a house for their accommodation without rental charge and that a deduction for power use was not mentioned until December 2006 and that such a deduction was not agreed to by them. They also insist that the house used by them was left in a clean and tidy condition. In support of that assertion, they produced photos of rooms in the house which they said were taken on the day that they left. Mr Johnston, for the Respondent, commented that there may be different standards operating between the parties in respect of the cleanliness and tidiness of the Applicants' former accommodation.

[26] I need not resolve conflicts in evidence on this point because I am satisfied that – in the absence of written and signed consents from the Applicants – the deductions sought by the Respondent are not permissible under the Wages Protection Act 1983.

Leave taken

[27] The Applicants accept that the Respondent is entitled to deduct two days for leave taken by them on 9 and 12 February 2007. They dispute that further hours should be deducted for what the Respondent says was leave taken on 17 November 2006 to attend to a visa application for Ms Berankova. The Respondent's suggested deduction of hours does not quite 'square' with other information provided by it suggesting that the Applicants' trip to Auckland city on 17 November 2006 was also to take a water blaster up to Manukau City. However, the Applicants do not deny that some time was taken for the purpose of a visa application and I give the benefit of the doubt to the Respondent on this particular point.

[28] A further eight hours is to be deducted as leave taken by the Applicants, that is a total of three days with a value of \$346.08.

Compensation and interest

[29] The Applicants sought compensation of \$1,000 for the inconvenience of

wages owed to them not being paid properly or on time. However, I am not satisfied that it is the appropriate remedy in what is really a wage recovery case, not a personal grievance application. Rather an award of interest is fit recompense for the delay in paying wages and holiday pay owed.

[30] The Respondent is to pay interest to the Applicants on the total sum of pay owing. Under clause 11 of Schedule 2 of the ER Act, the rate of interest is set at today's 90-day bill rate of 9.05% plus 2%, which totals 11.05%. Interest is to be paid for the period from 1 August 2007 to the date of this determination – being 238 days and totalling \$233.24.

[31] I have not set the interest period from the Applicants' last day of work, being 31 May 2007 – on which they were entitled to be paid the full amount of wages and any other pay owing – because the Respondent did offer cheques for its calculation of wages owed (being only \$691.11 for Mr Janovec and \$661.59 for Ms Berankova). It made arrangements that allowed for the Applicants to at least pick up those amounts from the company's accountant but they chose not to do so. They were entitled to more pay than was offered but they could also have done more to ameliorate their loss of the benefit of the money without foregoing their entitlement to the remainder of the wages and holiday pay owed.

[32] In the event that the full amount owed, as set out in this determination, is not paid within 14 days of the date of this determination (that is by 8 April 2008), additional interest is to accrue on the total amount of the debt from that date until the amount owed is paid in full at the rate of 98 cents a day.

Summary

[33] I set out the following summary of amounts for pay and holiday pay owed by the Respondent to each of the Applicants. The total amount is to be paid to each Applicant within 14 days of the date of this determination.

- Holiday pay on ordinary weekly earnings \$1439.69
- Additional pay for weekends \$1038.24
- Holiday pay on additional weekend earnings \$83.05

• Additional public holiday pay	\$115.36
• Lieu days (alternative holidays not taken before termination of employment)	\$922.88
• <i>Less</i> leave taken (3 days)	- \$346.08
Total on which interest is to be paid	\$3253.14
• <i>Plus</i> interest (238 days at 98 cents a day)	+ \$233.24
Total due to each Applicant	\$3486.38

[34] This employment relationship problem could have been avoided if the Respondent had paid proper attention to, firstly, its statutory obligation to provide a written employment agreement, agreed to and signed by the employees, and, secondly, to other statutes regarding holidays and what an employer may properly deduct from an employee's wages if written consent is given.

[35] Employment agreements are easily prepared, either from templates provided by legal and human resource advisers or from the Department of Labour website (see Employment Agreement Builder at www.ers.dol.govt.nz). Other information on statutory entitlements is also readily available from advisers or the Department of Labour website.

Costs

[36] The Applicants are entitled to reimbursement of their application fee in the Authority. The Respondent is to reimburse the Applicants the additional sum of \$70.

Robin Arthur
Member of the Employment Relations Authority