

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 101
5554643

BETWEEN DARREN OLIVER
 Applicant

A N D STAR MOVING LIMITED
 First Respondent

A N D SCOTT HAULAGE 2010
 LIMITED
 Second Respondent

Member of Authority: David Appleton

Representatives: Kevin Murray and Shayne Boyce, Advocates for
 Applicant
 Craig Morice, Counsel for Respondents

Investigation Meeting: Determined by consideration of the papers

Submissions Received: 2 June 2016 for Applicant
 None received for Respondent

Date of Determination: 4 July 2016

DETERMINATION OF THE AUTHORITY NO 2

Employment relationship problem

[1] By way of a determination dated 26 May 2016¹ the Authority found that Mr Oliver had been unjustifiably constructively dismissed by the second respondent, and subjected by it to an unjustified disadvantage in his employment. He was awarded remedies, but further information was needed from Mr Oliver to enable the Authority to assess whether further remedies were due.

¹ [2016] NZERA Christchurch 70

[2] It had appeared from the submissions of his representatives that Mr Oliver was seeking an award of holiday pay, a payment in respect of sick leave wrongly treated as annual leave, and *statutory entitlements of 2.50 days*. However, it was not clear how the amounts claimed had been calculated, nor the basis of the heads of claim in each case. Accordingly, I directed Mr Oliver to serve and lodge a comprehensive breakdown of his calculations supporting the sums claimed by him.

[3] This further information was received by the Authority on 2 June 2016. On 28 June 2016 the respondents indicated through Mr Acland, who had acted for them in the substantive investigation meeting, that they did not wish to reply to the submissions, and that Mr Morice was, henceforth, acting for them.

[4] I therefore determine this matter without having received any submissions from the respondents.

[5] Mr Oliver has now dropped his claim for *statutory entitlements of 2.50 days*. He is now seeking a payment of \$362.78 (net) in respect of unpaid holiday pay and a further day's pay when his sick leave was treated as annual holiday.

Unpaid holiday pay

[6] The second respondent had been paying Mr Oliver 8% of his gross earnings as holiday pay, regularly with his pay, despite the fact that the second respondent was not entitled to do so under s 28 of the Holidays Act 2003, as Mr Oliver's employment did not fulfil the criteria set out in s 28(1) to allow his employer to do so.

[7] Section 28(4) of the Holidays Act provides that, if the employer has incorrectly paid annual holiday pay with an employee's pay where subsection (1) does not apply (and it did not apply to Mr Oliver's employment) and the employee's employment has continued for 12 months or more, then despite those payments, the employee becomes entitled to annual holidays in accordance with section 16.

[8] Therefore, s 28(4) means that Mr Oliver is effectively entitled to his holiday pay again. Although the employment agreement between Mr Oliver and the second respondent provides that annual leave had to be taken within 12 months of the date of entitlement, that stipulation is in breach of s 16(4) of the Holidays Act, which provides that an employee's entitlement to annual holidays remains in force until the

employee has taken all of the entitlement as paid holiday or been paid out under s 28B.

[9] Mr Oliver claims a total of \$362.78 (net) in respect of holiday pay still outstanding. That sum is not contested by the respondent. I therefore accept it as the sum that is owed.

Sick leave treated as annual leave

[10] It does appear that Mr Oliver's sick leave day on 24 December 2014 was treated as annual leave, although it is not clear why. Therefore, Mr Oliver should have that day restored to him, as he had enough sick leave accrued for the sick day to have been treated as a day of paid sick leave.

[11] Mr Oliver is therefore entitled to an additional \$210.31 gross in respect of that day of annual leave.

Orders

[12] I order the second respondent to pay to Mr Oliver the following sums:

- a. The net sum of \$362.78; and
- b. The gross sum of \$210.31.

Costs

[13] Costs are reserved. The parties are to seek to agree costs between them. However, if they are unable to do so within 14 days of the date of this determination, any party seeking a contribution to their costs should serve and lodge a memorandum setting out what contribution they seek, and the basis for it, within a further 14 days. The other party will then have a further 14 days within which to serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority