



## **The issues**

[6] The issues for determination are whether or not Mr Wetere:

- should repay the loan advance made to him by Online
- should repay the overpaid wages received by him
- is owed any holiday pay by Online.

## **Background facts**

[7] Online Contractors operates a business constructing roads, drains, curbing and channelling, primarily for residential roads in subdivisions in the outskirts of Hamilton. The company has approximately 28 employees.

[8] Mr Wetere originally joined Online Contractors towards the end of 2006 in the capacity of a machine operator. In 2007 Mr Wetere was appointed as Foreman.

[9] Mr Wetere said that with effect from 2009 his salary was \$85,000.00 per annum with a \$10,000.00 bonus which was to be paid to him at the end of each 12 month period. He said this was a verbal agreement and there was no employment agreement presented for him to sign.

[10] At the end of the first year of this arrangement, he said that Online provided him with a company vehicle in lieu of the \$10,000.00 bonus.

[11] During the second year of the verbal employment agreement he was approached by Mr Todd Bawden, sole director and shareholder of Online, to discuss a reduction of his salary and bonus. Mr Bawden explained that Online was suffering from a cash flow problem, and as a result he agreed to reduce his salary from \$85,000.00 to \$80,000.00 until Online was in a better financial position, at which point the arrears would be paid to him.

[12] Mr Bawden said that Mr Wetere's salary, since his appointment as Foreman/Supervisor, had been at the rate of \$80,000.00 per annum, and that a bonus payment had never been discussed, nor had he provided Mr Wetere with a company vehicle in lieu of a bonus. However, he agreed that Online had bought a new 4 wheel drive vehicle which Mr Wetere had been allowed to use for personal use. Eventually Mr Wetere had sold the vehicle, but it had not been transferred over, nor was it recorded as a benefit in kind to Mr Wetere for the purposes of IRD. He also confirmed that Mr Wetere had not paid for any of the petrol usage, for either private or business use, which was included on company expenses.

[13] Mr Bawden denied that Mr Wetere's salary had been decreased at any point due to Online Contractors being in financial difficulty. He said that Mr Wetere had offered to take a decrease in salary; however, he had not accepted this offer as he did not feel it would benefit Online.

#### *The Loan Events*

[14] During 2012 Mr Bawden said Mr Wetere, with whom he had developed a close personal friendship, was having difficulties raising a sufficient deposit for a house purchase. In April 2012 Mr Wetere approached him and asked for his help, advising him that he needed a deposit of \$44,000.00 which would be sufficient to obtain a bank mortgage for the balance of the price of the property he and his wife wished to purchase. Mr Wetere asked Mr Bawden to lend him that money.

[15] Mr Wetere claims that the amount of \$44,000.00 represented monies he was owed by Online in respect of back pay in the amount of \$15,000.00 and in respect of a salary advance of \$29,000.00.

[16] Mr Bawden said he agreed to lend Mr Wetere the money and a payment of \$44,000.00 was made by Online to Mr Wetere on 20 April 2012. He said that Mr Wetere told him that the arrangement could not be recorded as a loan otherwise the Bank would not lend him the amount he required. Mr Wetere asked Mr Bawden to write a letter on his behalf to the Bank confirming the makeup of the \$44,000.00 Online had paid him.

[17] Mr Bawden agreed to Mr Wetere's request and provided a letter dated 30 April 2012. That letter was written by Ms Megan King, Office Manager for Online, on the instructions of Mr Bawden.

[18] Ms King said that on 20 April 2012 Mr Bawden instructed her to make a payment of \$44,000.00 from Online into the bank account of Mr Wetere, and advised her that the funds were in respect of a loan made by Online to Mr Wetere to assist him in the purchase of the house. Mr Bawden told her that the money was a loan that Mr Wetere would repay.

[19] Ms King confirmed that the payment of \$44,000.00 was made on 20 April 2012.

[20] Ms King said there was no discussion about the payment being on account of either back-pay or future pay. She was not instructed to make any adjustments to Mr Wetere's wage or payment records.

[21] Ms King provided an email to Mr Wetere on instructions from either Mr Bawden or Mr Wetere. The email was dated 26 March 2012 and stated:

*To whom it may concern*

*Re: Kira Wetere*

*This letter is to confirm proof of income for Kira Wetere for the 12 months ended 11 March 2012. The total gross earnings in this 12 month period were \$81,903.41.*

*Yours truly,  
Megan King*

[22] On 30 April 2012 Mr Bawden asked her to type a further letter to record that the a payment of \$44,000.00 made to Mr Wetere comprised payments to him of back pay in the sum of \$15,000.00 and a salary advance in the sum of \$29,000.00. Her understanding was that the letter was required as Mr Wetere's bank would not otherwise lend him the balance he required to purchase his house.

[23] Ms King said she spoke to Mr Wetere by telephone that morning to confirm the details and confirm where the letter was to be sent. She typed the letter and was present when it was signed by Mr Bawden. The letter stated:

*30 April 2012*

*To whom it may concern*

*Re: Kira Wetere*

*Online Contractors has given Kira Wetere the sum of \$44,000.*

*This amount is made up as follows:*

*\$15,000 back-pay owing to Kira  
\$29,000 increase in salary paid in advance*

*Instead of increasing his salary on a fortnightly basis this will remain the same until the value of \$29,000 has been reached.*

*Thank you  
Todd Bawden  
Director*

[24] Mr Bawden said during the Investigation Meeting that the content of the letter which he had signed was untrue and as a result enabled the Bank to be misled.

[25] He said Mr Wetere continued to be paid his usual weekly salary from 30 April 2012 until he tendered his resignation without any prior warning in July 2012. He said Mr Wetere worked for ten weeks only after receiving payment of the \$44,000.00.

[26] Mr Bawden said that Mr Wetere had told him that he would repay the loan as soon as he was able to refinance and secure additional borrowings from the Bank. However, Online has not received a repayment despite Mr Bawden's attempts to discuss the repayment with Mr Wetere on several occasions, including a visit to Mr Wetere's home.

[27] Following Mr Wetere's refusal to repay the loan amount, Online made an attempt during August 2012 to advance negotiations relating to repayment by providing Mr Wetere with an email and spreadsheet showing him the balances he would owe if, instead of his agreed pay, he provided notional or hypothetical salaries of \$80,000.00 or \$85,000.00. The email dated 30 August 2012 stated:

*Hi Kira,*

*I have attached a spreadsheet showing the difference in pay from what was paid to you compared to a salary of \$80K and a salary of \$85K, I have also included in these figures the finishing up holiday pay. The lump sum needs to be taxed at 33,000 plus 1.7% ACC as per the IRD.*

*As you can see from the spreadsheet as a salary of \$80K you would owe Todd \$36,664.87 and with a salary of \$85K you would owe \$19,523.62.*

[28] The spreadsheet provided by Ms King also set out Mr Wetere's actual salary payments during the years he was employed by Online:

<i>Year ended 31<sup>st</sup> March 2008</i>	<i>\$72,476.06</i>
<i>Year ended 31<sup>st</sup> March 2009</i>	<i>\$82,175.51</i>
<i>Year ended 31<sup>st</sup> March 2010</i>	<i>\$81,183.58</i>
<i>Year ended 31<sup>st</sup> March 2011</i>	<i>\$77,389.70</i>
<i>Year ended 31<sup>st</sup> March 2012</i>	<i>\$81,903.41</i>
<i>Last 3 months</i>	<i>\$21,204.61</i>

[29] The annual variations were explained as being attributable to the pay being calculated by the internal payroll system which requires payments to be calculated based on an hourly rate.

[30] Mr Wetere confirmed that he received an email from Ms King on 30 August 2012. The email had an attachment showing the salary of \$80,000.00 and \$85,000.00 and that the

actual amount he was paid included overtime. However, the spreadsheet did not reflect the bonus payment he alleges Mr Bawden had agreed to pay.

[31] Mr Weterere did not respond to the email.

#### *Overpayment*

[32] Ms King said that in January 2012 she discovered that she had made an error in December 2011 when loading data into the computer in respect of the wages to be paid over the summer holiday period. At that time Mr Weterere had his wages paid into two separate bank accounts. The error had arisen because instead of making two payments to Mr Weterere, she had made three, resulting in an overpayment to Mr Weterere.

[33] She advised Mr Bawden of the error. Mr Bawden advised her after he had spoken to Mr Weterere, that he (Mr Weterere) was aware of the overpayment, but had spent the funds, and had asked for the overpayment to be deducted from his holiday pay to avoid his having to make a repayment in the interim.

[34] Following Mr Weterere's resignation and his leaving Online, Ms King prepared a spreadsheet which was sent to Mr Weterere on 4 September 2012. In the accompanying email Ms King stated:

*Please find attached the spreadsheet showing the annual leave. It is worked out as hours taken and due not days. The 50.5 hours are the balance from previous years and then the 8% is the current year. There are extra hours in January 2012 this is due to the fact that you were double paid back in December and it was agreed instead of paying it back it would be paid out as holidays.*

#### *Calculation of final holiday pay*

[35] Ms King said she had calculated Mr Weterere's final net holiday pay due of \$4,940.49, comprising annual leave outstanding from the previous year of 50.5 hours: \$1912.50, holiday pay due for the current year at 8%: \$5,493.56, less PAYE: \$2169.04 and Kiwisaver: \$296.23.

[36] She had been instructed by Mr Bawden to hold that balance until the loan was repaid by Mr Weterere. When Mr Weterere refused to pay the loan, she was instructed to apply the holiday pay of \$4,940.49 in reduction of the balance referred to in her memorandum dated 30 August 2012.

[37] Mr Wetere stated that Online is relying on a clause in an individual employment agreement that may have given Online the right to deduct holiday pay if at the termination of his employment he had owed any monies to it.

[38] Mr Wetere, in addition to claiming that Online owes him the net holiday pay amounting to \$4,940.49, denies ever signing a written individual employment agreement.

#### *The Employment Agreement*

[39] The individual employment agreement (the Employment Agreement) contains the following clauses:

***1. Employment Position: Foreperson/Supervisor***

***5. Remuneration***

*5.1 The total remuneration for ordinary time worked is thirty seven dollars and eighty six cents (\$37.86) per hour.*

***6. Deductions***

*6.1 Pursuant to Section 5 of the Wages Protection Act 1983, the Employee consents to the Employer deducting from any money owing to the Employee during employment or on termination of employment any sum including for lost or damaged clothing or equipment which may be owed by the employee to the Employer. This includes but is not limited to holiday payments made in advance of entitlements or any amount to be forfeited by the Employee for failing to give agreed notice of termination.*

[40] It is allegedly signed by Mr Wetere and dated 29 March 2013. Mr Wetere denied signing the Employment Agreement and stated that he was not in New Zealand in March 2013.

[41] Mr Bawden said that written individual employment agreements were provided to all Online employees in 2012. On the basis that Mr Wetere was no longer an employee of Online after July 2012, I accept that the year of the date on the Employment Agreement is incorrect and should read 2012.

[42] Mr Bawden's evidence is that the signature of Mr Wetere on the Employment Agreement is genuine. Whilst Mr Wetere denied that it was, he confirmed during cross-

examination in the Investigation Meeting that it looked similar to another example of his signature presented to him.

[43] I accept as more likely than not that the Employment Agreement was signed by Mr Wetere in March 2012, and consequently Online is entitled to rely on its terms.

### **Determination**

#### **Did Mr Wetere receive a payment of \$44,000.00 from Online which should be repaid?**

[44] During the Investigation Meeting Mr Wetere's evidence was that he had expected Online to make a PAYE payment on the amount of \$44,000.00, and confirmed that he had not personally accounted to the IRD for the payment or informed the IRD of any circumstances relating to the payment.

[45] Mr Wetere did not provide any evidence or comment on the fact that if the payment represented unpaid wages and a salary increase paid in advance and PAYE had been paid or agreed to be paid, the amount of \$44,000.00 would have been a net payment, and if a gross payment would have been substantially more, which puts in doubt Mr Wetere's explanation as to what the payment represented.

[46] Mr Bawden claimed in the Investigation Meeting that he had made the loan payment of \$44,000.00 to Mr Wetere personally, taking the money from, and it forming part of his personal 'Drawings' from Online. The Shareholder Current Accounts provided for the year ended 31 March 2013 show an amount of \$150,988.00 as "*Drawings – Todd*".

[47] Mr Bawden also claimed that he had made a personal tax payment to the IRD on that amount. I requested that confirmation be provided to the Authority, however none has been received and no detail of the makeup of the sum of \$150,988.00 has been supplied to the Authority.

[48] The Online bank statements provided at my request show a Direct Debit payment in the amount of \$44,000.00 on 20 April 2012 to 'INTNL TRADE FIN DL'. Mr Bawden's first explanation when questioned at the Investigation Meeting about this amount was that it was a payment made to a supplier to Online. However following requests by the Authority, further information was provided by Online on 29 November 2016 which included an email from an ANZ bank employee stating:

*I can confirm the following (evidenced by the following attachments):*

- *Account number 06-0317-0749482-00(Online Contractors Limited) was debited \$44,000 on the 20/04/2012.*

- *Account number 12-1323-004259-02 (Ellice Tanner Trust Account) was credited \$44,0000 on the 20/04/2012.*
- *Our understanding is the \$44,000 was paid to Ellice Tanner Hart Solicitor as a same day cleared payment (rationale for the odd reference on your statement) forming part of the settlement proceeds in a property purchase for Kira Wetere.*

[49] I find that it is clear from this document: “*(rationale for the odd reference on your statement)*” and Mr Bawden’s earlier responses that Online made an attempt to disguise the payment as not being made directly to or for the benefit of Mr Wetere.

[50] I find that Online made a payment of \$44,000.00 on 20 April 2012 to a solicitor’s trust account in respect of behalf of a property purchase by Mr Wetere.

[51] Mr Wetere claims that the amount of \$44,000.00 represented monies he was owed by Online in respect of back pay in the amount of \$15,000.00 and in respect of a salary advance of \$29,000.00.

[52] Mr Wetere provided IRD Personal Tax Summary records covering the period 1 April 2005 to 31 March 2012, although the record for the tax year 1 April 2009 to 31 March 2010 is missing. The IRD records show the following annual payments received by Mr Wetere from Online:

1 April 2005 – 31 March 2006	\$30,027
1 April 2006 – 31 March 2007	\$71,997
1 April 2007 – 31 March 2008	\$72,470
1 April 2008 – 31 March 2009	\$82,169
1 April 2009 – 31 March 2010	Missing
1 April 2010 – 31 March 2011	\$77,383
1 April 2011 – 31 March 2012	\$81,898

[53] The IRD records provided by Mr Wetere are consistent with the actual pay amounts set out in the spreadsheet Ms King sent to Mr Wetere on 30 August 2012.

[54] Ms King also supplied a letter on 26 April 2012 setting out Mr Wetere’s income as \$81,903.41. There is no evidence as to the purpose for which this letter was requested,

however given its proximity to the letter dated 30 April 2012 confirming Online had provided Mr Wetere with an amount of \$44,000.00 which was to assist his house purchase, I conclude that it was to support Mr Wetere's application for a bank loan for the same purchase.

[55] That being the case, I would have expected Mr Wetere to have disputed the income stated, wanting it to be at the higher level of \$85,000.00 per annum to bolster his house purchase application. However he did not do so.

[56] I find that from 2009 Mr Wetere's salary was approximately \$80,000.00 per annum, and not \$85,000.00 as he alleged.

[57] Further there are no written documents which support Mr Wetere's assertion that he was owed back pay by Online. There is also no written evidence that Online agreed that Mr Wetere was to be given an annual bonus of \$10,000.00.

[58] Whilst Mr Wetere claims that he was provided with a company vehicle by Online which was fully expensed, he confirmed at the Investigation Meeting that this had not been treated as a benefit in kind, he had not reported this to the IRD and consequently he had not paid tax on it as such.

[59] I determine that the \$44,000.00 payment made to Mr Wetere was not in respect of back pay owing to Mr Wetere, or a salary increase paid in advance, but it was a loan made by Online on 20 April 2012 paid into a solicitor's trust account for the benefit of Mr Wetere.

[60] I find that the loan would not have been made but for the employment relationship between Online and Mr Wetere, and therefore pursuant to s 161(1) (r) of the Employment Relations Act 2000 (the Act) I determine that the loan of \$44,000.00 was repayable upon demand by Online, and there is no disagreement between the parties that prior to the Investigation Meeting a demand for repayment of the \$44,000.00 had been made.

[61] I determine that Mr Wetere received a payment of \$44,000.00 from Online which should be repaid.

**Did Mr Wetere receive an overpayment of wages from Online which should be repaid?**

[62] Online seeks to recover an overpayment of wages made to Mr Wetere, in the gross amount of \$4,485.55 which I have calculated by utilising data in Ms King's memorandum dated 4 September 2012 as 117.5 hours outstanding holiday entitlement at \$37.86 per hour. If either party queries this amount they may refer back to the Authority with a joint agreement as to the value of the overpayment.

[63] Ms King said that she had made an error in December 2011 when loading data into the computer in respect of wages to be paid over the summer holiday period. The error had arisen because instead of making two payments to Mr Wetere, she had made three, resulting in an overpayment to Mr Wetere, money to which he was not entitled.

[64] Mr Bawden confirmed, and Mr Wetere does not dispute, that he (Mr Wetere) was made aware of the overpayment sometime in January 2012 but had spent the funds, and had asked for the overpayment to be deducted from the value of his outstanding holiday entitlement to avoid his having to make a repayment in the interim.

[65] Section 6 of the Wages Protection Act 1983 (WPA) governs the circumstances in which an overpayment of wages may be recovered by an employer. The circumstances relate only to recovery of overpaid wages in respect of what the WPA defines as a recoverable period. None of the elements of the recoverable period apply in the present case, and thus the circumstances fall outside of s.6 of the WPA.

[66] Section 5 of the WPA states:

***Deductions with worker's consent***

*(1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—*

*(a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or*

[67] It is appropriate that I determine this issue. In *New Zealand Fire Service Commission v. Warner*<sup>1</sup> Chief Judge Colgan decided that:

*The Employment Relations Authority is the appropriate institution at first instance (and is empowered accordingly) in which to determine whether employees are required to repay to their employer monies overpaid mistakenly in the course of their employment relationship. If liability is established, the usual remedies for such causes of action are available to the Authority."*

[68] In the case of *Foai v Air New Zealand Ltd*<sup>2</sup> Judge Ford considered and rejected an application by Air New Zealand Ltd for restitution in the situation in which it had over paid Mr Foai a significant amount of money. However whilst the application by the employer did not succeed on that occasion, the case highlights the right of an employer to bring such a claim and have it considered by the employment jurisdiction.

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<sup>1</sup> *New Zealand Fire Service Commission v. Warner* [2010] NZEMPC 90 at 45

<sup>2</sup> [2012] NZEmpC 57

[69] In this case, Online is seeking to recover in the Authority an overpayment made by it in error.

[70] I am satisfied that Online, specifically Ms King, made the overpayment as the result of a simple mistake which is one of the qualifying factors activating claim of unjust enrichment and gives rise to right to restitution.

[71] Online states that following the discovery of the overpayment in January 2012 it operated an informal set off reducing Mr Wetere's holiday entitlement. Online claims that clause 6 of the Employment Agreement allowed such an action at that time.

[72] Clause 6 of the Employment Agreement states: "*..... the Employee consents to the Employer deducting from any money owing .... Any sum ... which may be owed by the employee to the Employer. This sum includes but is not limited to holiday payments made in advance of entitlements ...*"

[73] I have found that in all probability the Employment Agreement was signed in March 2012 (at paragraph 43). It states at clause 1.3 that '*this agreement replaces any previous agreements and arrangements between the parties*' and clause 2.1 '*the conditions of employment specified in this agreement shall commence from the date signed...'*'.

[74] According to Ms King's memorandum dated 4 September 2012, the overpayment took place in December 2012.

[75] The offsetting of holiday entitlement against money owed to an employer must in effect be considered to be 'holidays paid out.' In accordance with s 28A(2) of the Holidays Act 2003, an employee's request that a portion of their entitlement to annual holidays be paid out: (a) must be in writing, and (b) cannot be for more than 1 week in each year.

[76] There is no evidence that such a request was made in writing and the amount involved represented more than one week of annual holiday. Therefore in this case there is no statutory basis for the overpayment of wages to be recovered by an arrangement for Mr Wetere to forgo such holiday entitlement.

[77] I am satisfied from the evidence presented that the overpayment was a simple mistake which in turn gives rise to a right to restitution. Mr Wetere received an overpayment of wages from Online which should be repaid. I therefore consider whether or not there is a contractual basis for such recovery.

[78] The Employment Agreement entitled Online at clause 6 to deduct any sum owed by the Employee to the Employer from any sum owed by the employee to the to the employer at termination.

[79] **Accordingly I determine that (i) Online is to credit Mr Wetere's outstanding holiday pay entitlement at termination with 117.5 hours at \$37.86 per hour; (ii) in accordance with clause 6 of the Employment Agreement, Mr Wetere is to repay to Online the total amount of overpaid wages in the sum of \$4,485.55.**

**Is Mr Wetere owed unpaid holiday pay by Online?**

[80] Mr Wetere claims that he is owed unpaid holiday pay due at the termination of his employment which has been deducted by Online in part settlement of outstanding money owed by him to Online.

[81] I have accepted the data relating to Mr Wetere's outstanding holiday entitlement as set out in Ms King's memorandum dated 4 September 2012, which I have determined is to be updated by crediting 117.5 hours to the hours taken column. This increases the annual leave entitlement to 168 hours resulting in the financial statement as:

Annual leave due 168 hours	\$6,360.48 (168 x \$37.86)
Holiday pay 8%	<u>\$5,493.56</u>
Gross holiday pay due	<u>\$11,854.04</u>

[82] I find that Mr Wetere's outstanding holiday pay entitlement at the termination of his employment on or about 10 July 2012 was \$11,854.04 gross.

[83] Online claims that the outstanding holiday pay may be deducted from monies it is owed by Mr Wetere namely the \$44,000.00 loan made in April 2012, in accordance with clause 6 of the Employment Agreement. I note that there were no conditions such as interest payable or a repayable date associated with the loan, I therefore considered it to be an interest free loan repayable on demand.

[84] Section 4 of the Wages Protection Act 1983 provides that there shall be no deductions from an employee's wages except in accordance with Act, and subject to sections 5(1) and 6(2) an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[85] Section 5(i) of The Wages Protection Act sets out:

***Deductions with worker's consent***

*(1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—*

*(a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or*

*(b) on the written request of the worker*

[86] I find that clause 6 of the Employment Agreement meets this requirement; however s 5(1)(A) states:

*An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.*

[87] A general deductions clause in an employment contract does not provide free reign for an employer to make deductions of any nature. The duty of good faith under section 4 of the Act applies and consultation as to the amounts of such deductions should occur.

[88] Clause 6 of the Employment Agreement is a general deductions clause, and I consider the deduction proposed by Online to be a specific deduction as repayment of an on demand loan made under special circumstances. The onus was clearly on Online to consult with the Mr Wetere and explain the nature of the deduction and the reasons for it.

[89] There is no evidence that Online consulted with Mr Wetere prior to making the deduction. Accordingly I find that Online cannot rely on clause 6 of the Employment Agreement as authority to make the deduction in the absence of Mr Wetere's consent.

[90] I determine that Mr Wetere is owed unpaid holiday pay by Online.

**Orders**

Loan

[91] **I order Mr Wetere to pay to Online the sum of \$44,000.00 in respect of the loan.**

[92] In any matter involving the recovery of any money, the Authority may, under clause 11(1) of Schedule 2 of the Act, if it thinks fit, order the payment of interest at the rate prescribed under section 87(3) of the Judicature Act 1908.

[93] **I order Mr Wetere to pay interest on the sum of \$44,000.00 at the rate of 5% per annum from the date of this determination until the date of payment.**

Repayment of over payment of wages

[94] I order that Mr Weterere repay to Online the total amount of overpaid wages in the sum of \$4,485.55 gross.

[95] I order that Online credit Mr Weterere's outstanding holiday pay entitlement at termination with 117.5 hours at \$37.86 per hour.

Repayment of unpaid holiday pay

[96] **I order Online to pay to Mr Weterere the sum of \$11,854.04 gross in respect of unpaid holiday pay.**

[97] Mr Weterere also claims interest on the late payment of holiday pay

[98] **I order that Online pay interest on the sum of \$11,854.04 gross at the rate of 5% per annum from the date of this determination until the date of payment.**

**Costs**

[99] Costs are reserved. Given the extent to which both parties have been successful I am minded to let costs fall where they lie.

[100] Should the parties wish to apply for costs, they are encouraged to agree costs between themselves. If they are not able to do so, the parties may lodge and serve memoranda as to costs within 28 days of the date of this determination. No application for costs will be considered outside this time frame without prior leave.

[101] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Direction**

[102] The issues raised in this investigation process clearly have taxation implications. I therefore direct that a copy of this determination is made available to the IRD.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**