

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 314
5568206

BETWEEN BEN OTTESEN
 Applicant

AND GRAHAM AND ANNETTE
 IRELAND
 Respondent

Member of Authority: Nicola Craig

Representatives: Warwick Reid, Advocate for the Applicant
 Annette Ireland on behalf of the Respondent

Investigation Meeting: 24 May 2016 in Hamilton

Submissions Received: At the investigation meeting and 7 and 14 June 2016

Determination: 15 September 2016

DETERMINATION OF THE AUTHORITY

- A. Ben Ottesen was not dismissed by Graham and Annette Ireland. His employment ended at his own volition.**

- B. The Irelands must pay Ben Ottesen \$313.14 gross for wages and holiday pay arrears within 14 days of the date of this determination.**

- C. Costs are reserved with a timetable for memoranda to be lodged and served if necessary.**

Employment relationship problem

[1] Ben Ottesen was employed as a truck driver by the partnership of husband and wife Graham Ireland and Annette Ireland (the Irelands) from April 2015.

[2] Mr Ottesen was initially introduced to the Irelands by their son Ricky Ireland¹, who was acquainted with Mr Ottesen. The Irelands are based in Huntly and ran their business from there. When starting work for the Irelands, Mr Ottesen moved from Tauranga to Te Puke and ran one of the Irelands' trucks from there. He drove to service a new transport agreement between the Irelands and Transflow Limited, a company located in Rotorua. Mr Ottesen had been told that the Transflow contract was a three month trial for the Irelands to see if it would work for them.

[3] It was common ground that the Irelands decided to terminate the Transflow contract as it was not as economically viable as expected. The parties then disagree on whether Mr Ottesen was told that he could continue to work based from Te Puke for the Irelands, or whether he had to move to Huntly in order to continue. Mr Ottesen says that he was dismissed, whereas the Irelands say that he resigned.

[4] There is neither a letter of resignation nor a letter of dismissal. Mr Ottesen's last day of employment was 25 June 2015.

[5] An investigation meeting was held in Hamilton on 24 May 2016 where I heard evidence from Mr Ottesen, his wife Jamie Ottesen, Graham Ireland, Annette Ireland and Ricky Ireland.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[7] The issues for investigation and determination are:

- (a) Was Mr Ottesen dismissed by the Irelands?
- (b) If he was, was the dismissal justified?
- (c) If the dismissal was not justified, what remedies should Mr Ottesen be awarded, considering:
 - (i) Reimbursement of lost wages under s123(1)(b) of the Act; and

¹ Reference will continue to Graham and Ricky Irelands first names in order to distinguish them

- (ii) Compensation for humiliation, loss of dignity and injury to feelings?
- (d) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Ottesen that contributed to the situation giving rise to the grievance?;
- (e) Is Mr Ottesen owed any wages and holiday pay by the Irelands?; and
- (f) Should either party contribute to the costs of representation of the other party?

Ricky Ireland's authority

[8] Before dealing with the dismissal issue, I will consider Ricky Ireland's authority. Mr Ottesen claims that Ricky Ireland had ostensible authority to dismiss him. Reliance is placed on *Clark v Nelson Marlborough District Health Board*².

[9] The employment agreement required Mr Ottesen to report to Graham Ireland each working day via phone or in person at the beginning and end of the shift, or any other representative of the employer, designated by the employer.

[10] Ricky Ireland had on-going dealings with Mr Ottesen once he started work for the Irelands. Due to the previous connection between Mr Ottesen and Ricky Ireland There was disagreement between Mr Ottesen and Ricky Ireland regarding the extent of their acquaintance or friendship prior to Mr Ottesen started work for the Irelands. Ultimately I do not consider that this issue which enables me to determine whether Ricky Ireland had ostensible authority on behalf of the Irelands.

[11] Ricky Ireland had no formal or paid role in the partnership and had his own earthmoving business, which was not based in Huntly. Ricky Ireland was based closer to where Mr Ottesen was operating from. Mr Ottesen knew that Ricky Ireland had his own business unrelated to the Irelands' trucking business.

[12] Mr Ottesen says that he was initially told that he could report to either Graham or Ricky Ireland every day, but that they were happy for Ricky to be the daily point of contact for hours and issues with the truck or runs. The Irelands agreed that Mr

² [2002] 2 ERNZ 483 at 501

Ottesen was given permission to report start and finish and any truck related matters to Ricky Ireland. The dispatch was done by Transflow.

[13] In terms of actual contact, Mr Ottesen said in his brief of evidence that “all contact was with Ricky”.

[14] The Irelands disagreed and produced Graham Ireland’s phone logs which showed voice calls to Mr Ottesen’s cell phone. In the fortnight from 5 May 2015 there were calls most working days, generally lasting between 10 and 20 minutes. There were also calls on 10 and 13 June 2015, each lasting at least 15 minutes. I therefore do not accept Mr Ottesen’s evidence that all his contact was with Ricky Ireland.

[15] In questioning Mr Ottesen said that at the start of his employment Graham Ireland would call regularly but not towards the end. In final submissions on behalf of Mr Ottesen it was suggested that these phone logs were not genuine, but this issue was not raised in the course of the investigation meeting. I do not find that there is sufficient basis for me to decide that the phone logs are not genuine.

[16] Mr Ottesen said that he spoke to Ricky Ireland on a day to day basis. On the one occasion he had issues with the truck Ricky Ireland took control of the matter. Ricky Ireland agreed that the contact was frequent, sometimes several times a day, given that the men could talk with hands free device whilst working.

[17] I accept that although Ricky Ireland had no formal role in the Ireland partnership’s business, he was given authority by the Irelands to be the day to day contact point for Mr Ottesen. My impression was that Mr Ottesen had considerably more contact with Ricky Ireland on work matters than he had with Graham Ireland.

[18] I also accept that the contact between Mr Ottesen and Ricky Ireland was more than a reporting on work duties. There were sometimes lengthy discussions which included talk on non-work matters.

[19] Ricky Ireland says that he had no authority from his parents to dismiss their staff. However, Mrs Ireland accepted that there was no suggestion by herself or her husband that there was a limit on their son’s authority.

[20] I am satisfied that Ricky Ireland had ostensible authority to act on behalf of the Irelands as regards Mr Ottesen, as the words and conduct of the Irelands represented that Ricky Ireland had the requisite authority.

Cancellation of trucking contract

[21] The Irelands made a decision not to continue with the Transflow contract. Prior to that Graham Ireland says he met with the owner of the business that Graham had a contract to drive for. This was to see if there was work to be had if Mr Ottesen's truck stayed in the Tauranga area with Mr Ottesen driving. Graham Ireland was told that there was a lot of work available there.

[22] There is a dispute about who told Mr Ottesen about the cancellation of the Transflow contract. Mr Ottesen says that Ricky Ireland told him by phone.

[23] Graham Ireland says that he contacted Mr Ottesen in early June 2016 to advise him that the Irelands had decided to cancel the Transflow contract due to lack of revenue, and to place the truck on their current contract (delivering for another business).

[24] Graham Ireland says that he told Mr Ottesen that nothing about his employment would change as the truck would be doing similar work, with Graham now dispatching the work, and Mr Ottesen lived in a prime position for the operation of the work required. Graham Ireland says that he told Mr Ottesen that he would probably have to stay away for about two nights a week on the odd occasion. My impression was that this was more time away overnight than was originally discussed on Mr Ottesen's appointment.

[25] Mr Ottesen did not recall discussion with Graham Ireland on this issue and denied that such a discussion had occurred. Rather he thought that this discussion was with Ricky Ireland.

[26] However, Graham Ireland's phone records indicate he did speak to Mr Ottesen on 10 and 13 June, each time for over 15 minutes. Mr Ottesen was unable to recall any discussion with Graham or Annette Ireland regarding whether the truck would be moved to Huntly. Given that all agree that what was happening after Transflow was

being considered at this point, it seems unlikely that Graham Ireland would have two fairly lengthy calls to Mr Ottesen at this time without discussing this issue.

[27] Mrs Ireland says that her understanding was that it was her husband who had told Mr Ottesen about the Transflow change, rather than her son. She says that the Irelands had no intention of relocating the truck back to Huntly once the Transflow contract had finished.

[28] I accept Graham Ireland's evidence regarding the fact and content of the call informing Mr Ottesen of the change of contract.

[29] Mr Ottesen's position regarding whether there was a period when he was told that the truck was staying in Tauranga/Te Puke. In the statement of problem it states that on 15 June Ricky Ireland told Mr Ottesen the Transflow contract would end and the truck being driven would be relocated to Huntly. However, according to his brief of evidence, Mr Ottesen's understanding, when he was first told about the contract cancellation, was that his job was secure because another logistics contract was to be arranged.

[30] Ricky Ireland's evidence was also that he assured Mr Ottesen that his job was safe and the work would be carried out for another client, based where it was. Further, after Mr Ottesen had spoken with Graham Ireland about the change in contract, Ricky Ireland's impression was that Mr Ottesen seemed fine about it and had no concerns.

[31] On 19 June 2015 Mr Ottesen texted Ricky Ireland to advise that he was sick that day and could not work. Mr Ottesen says that around 8 to 9 am Ricky Ireland phoned him back and told him that Graham Ireland was not happy about Mr Ottesen being sick and not being able to drive the truck. He says that Ricky Ireland said that his father wanted the truck based out of Huntly so they could get another driver if Mr Ottesen was ill. He says that Ricky Ireland told him to move to Huntly with the truck or lose the job.

[32] Mr Ottesen says that he presumed that his contract would come to an end if he did not move to Huntly. He therefore posted a Facebook message shortly after that indicating that due to a situation that is outside his control he will be looking for another job in the Bay of Plenty. In questioning Mr Ottesen says that he did not know

definitely at this point that the truck was being moved but that he was just putting it out there.

[33] Mr Ottesen's view is that what happened on the 19 June set off the relocation of the truck to Huntly. When questioned, Mr Ottesen said that that (decision to relocate for that reason) was unreasonable. When asked about why he did not feel the need to ring Graham Ireland then, Mr Ottesen said that he felt Ricky Ireland had done the talking for both of them.

[34] Mrs Ottesen says that her husband phoned her on 19 June quite upset. He told her that because he was sick Ricky and Graham Ireland were not happy that the truck was parked up and it would have more chance of being used if it was in Huntly. Mrs Ottesen's impression from her husband was that a decision had been made to move the truck.

[35] Ricky Ireland denied that he had told Mr Ottesen that his father was considering relocating the truck to Huntly.

[36] Mrs Ireland says that her son phoned her on 19 June when he could not get hold of his father, to advise that Mr Ottesen was sick that day. She says that she understood that it was winter and people get sick. They made allowance of two or three days that over winter for sickness. She also says that they did not have any particular people (around Huntly) who could take up short term driving to cover, except for weekend work. Mrs Ireland was not aware of any discussion about the truck being moved to Huntly.

[37] Graham Ireland says that he did not want Mr Ottesen working if he was sick in case he had a crash, and also he knew himself what it was like to be sick and have to work. He says that he was not going to change his whole business because of one sick day, and that he had thought it was good of Mr Ottesen to offer to drive sick, even though that offer was not taken up.

[38] The Irelands both says that Mr Ottesen was a good worker and they wanted to keep him on in the business. Further, Te Puke was a prime location for their business operation being close to various timber proceeding plants, kiwifruit packhouses and the Port of Tauranga.

Alleged resignation

[39] On 21 June Mr Ottesen texted Ricky Ireland saying:

Hey dude...haven't heard back from Lee³ with any work for Monday as of yet...also could you please confirm if the trucks going back to Huntly as we cannot relocate again... Have too much here Jaime's job, kids' day care etc...Cheers Bro

[40] Ricky Ireland says that he immediately phoned Mr Ottesen to say the truck wasn't moving to Huntly and that it was only the contract that was moving from Rotorua to Huntly, not the truck. He says that Mr Ottesen said that he did not want to stay away from his family overnight, something which the two had discussed before. Ricky Ireland says that Mr Ottesen said that he was handing in his notice of resignation and would be leaving (in two weeks) on 3 July. I note that the employment agreement only required one week's notice.

[41] Ricky Ireland says that Mr Ottesen asked him if he could let his father know. Ricky Ireland suggested that Mr Ottesen phone himself but he did not want to.

[42] Annette Ireland says that her son phoned her on 22 June to say that Mr Ottesen had handed in his verbal resignation and would be finishing on 3 July. The reason that was passed on to her was family reasons. Mrs Ireland was uncertain what was meant by family reasons and asked her son to convey that they wanted written notice. Later that day Ricky Ireland phoned back to say that Mr Ottesen had an interview with a company on the following Saturday.

[43] Ricky Ireland says that he asked Mr Ottesen to put his notice in writing but that nothing was received.

[44] Mr Ottesen accepted that he had texted on 21 June and accepted that there may have been a call but could not recall the conversation. He denied that he said that he was going to resign.

[45] Ricky Ireland says that during that same day Mr Ottesen informed him that he had procured a job interview with a company the following Saturday. Mr Ottesen said that Ricky Ireland had found that out another way, but did not deny the interview.

³ From Transflow

End of employment

[46] On 23 June 2016 while at the KLC site Mr Ottesen rang Ricky Ireland and said that he did not know how to load the truck.

[47] Ricky Ireland says that Mr Ottesen sounded stressed; having said that he was off his meds (medication)⁴. Ricky Ireland provided some assistance with the load issue on the phone and Mr Ottesen then became calm and his conversation was normal again.

[48] Ricky Ireland says that Mr Ottesen then said he thinks he will call it a day. Ricky Ireland initially thought Mr Ottesen was saying he was going home for the day but later further comments made him realise that Mr Ottesen was actually finishing there and then permanently.

[49] Ricky Ireland says that he told Mr Ottesen that he could not just walk off the job there; what are we going to do with the loaded truck, it can't be left loaded. Mr Ottesen replied no no, I'll unload the truck for you. Ricky Ireland says that he asked why but that Mr Ottesen did not give what Mr Ireland regarded as a reasonable explanation but did say that he was off his meds (medication/s). Ricky Ireland says that this comment distracted him (as he was not aware of any medication) but that he thought that once Mr Ottesen got out of the situation he was finding stressful, Mr Ottesen would be fine.

[50] Mr Ottesen says that he was seeking assistance regarding the best way to load the truck to economise on the multiple drop offs required in Auckland.

[51] Mr Ottesen says that during the discussion Ricky Ireland asked him "can't you handle it?" meaning the job. Mr Ottesen said that he replied that he was just seeking advice to try and reduce costs and road mileage. Mr Ottesen says that Ricky Ireland implied (incorrectly) that this was not the first time that he had asked for this sort of advice. He says that Ricky Ireland became angry and was swearing, and said that he intended to ring Transflow and try to cancel the Auckland load.

⁴

[52] Mr Ottesen says that later Ricky Ireland phoned him back and said he had spoken to Transflow, and that Mr Ottesen had to deliver the load the next day, but that that the following day would be Mr Ottesen's last day of work.

[53] Mr Ottesen said that Ricky Ireland had phoned him later that day saying that his parents had given Mr Ottesen a great opportunity and that he had let Ricky Ireland down.

[54] Although there were some phone records produced for this period, I found that these did not assist me to determine the truth of these conflicting versions of events.

[55] In terms of other witnesses, Mrs Ottesen says that her husband called her distraught on 23 June, saying that was it.

[56] Mrs Ireland says that her son phoned her on 23 June and told her that Mr Ottesen had said he was finishing work for the Irelands. She did not get any sense from what her son said or his voice, that there had been any altercation between the two men. She got the impression that the men were still friends. Ricky Ireland agreed that that was the case until Mr Ottesen rang up some days after leaving, seeking more money.

[57] Graham Ireland says that when his son told him that Mr Ottesen was going to leave, he said that there was not much that he could do about it, taking he view that you cannot make someone stay.

[58] On 24 June Mr Ottesen drove to Auckland and unloaded the truck there. He picked up a load as requested by Transflow. As he did not have time to unload on his return to the Bay of Plenty, he left that task until 25 June. However, the truck had a leaky hose on 25 June. Mr Ottesen phoned a mechanic and waited for them on the roadside to come and fix it. He then drove the truck home and washed it.

[59] On 24 June Mr Ottesen said he spoke to Ricky Ireland and Mr Ireland told him that that was to be his last day. When asked if Ricky Ireland had given a reason for that, Mr Ottesen did not answer promptly, saying that he was not stalling, he was just trying to think, and then said that to the best of his knowledge it was because the truck was being relocated back to Huntly.

[60] I found this part of Mr Ottesen's evidence hard to follow. Mr Ottesen seemed to be suggesting that he was dismissed during the situation on 23 June with advice being sought regarding loading and the Auckland trip, where Ricky Ireland became angry and said Mr Ottesen could not handle it (the job). However, Mr Ottesen also says that the reason which Ricky Ireland gave for his dismissal was the truck moving to Huntly.

[61] The letter from Mr Ottesen's representative raising his personal grievance also referred to the reason for dismissal was redundancy, namely that the contract had been ended abruptly by the Irelands and there was no further work. However, the Transflow contract was not finished at the time Mr Ottesen finished work.

[62] On 26 June Ricky Ireland texted Mr Ottesen saying that he would pick up the truck early the next morning. Mr Ottesen texted back in what I describe as a friendly manner. Ricky Ireland says that when he picked up the truck the two men shook hands and everything seemed amicable. Mr Ottesen says that he had a friend with him to ensure that there was no altercation between himself and Ricky. He says that he does not recall if they shook hands.

[63] On 28 June Mr Ottesen posted on Facebook as follows:

Unfortunately uncontrollable situation with the truck being based back in Huntly and me not being able to relocate due to my wife's job here and kids' day-care etc. Just moving forward and focused on finding another job.

[64] Ricky Ireland took over driving the Tauranga truck temporarily after Mr Ottesen finished. He has a licence but had no experience of a curtain-sider truck, and says that he had to put his own business on hold for about a week in order to do the driving.

[65] On 1 July Mr Ottesen phoned Ricky Ireland to say he was not happy about his wage. Ricky Ireland says that he thought it was fair, and said that he was not happy about Mr Ottesen walking off the job.

[66] On 2 July 2015 Mr Ottesen posted on Facebook, in response to someone posting a Stuff news item about a national truck driver shortage :

“Yeh read it...guess a week wasn’t too bad a time frame to get a job but still was pretty hard”.

[67] When questioned, Mr Ottesen said that he had not got a job within a week (of leaving the Irelands) and his comment about the job related to someone else altogether. When asked what the “still was pretty hard” comment related to Mr Ottesen said that he was not entirely sure what he meant.

[68] When it was then clarified that the poster of the article was his brother, Mr Ottesen said that it was a friend of his brother who had got the job within the week and that he did not know this person’s name. When asked why he was worried that it was hard for this person, Mr Ottesen said that they were just the words I said and he did not mean it.

[69] Mr Ottesen accepted that he had not phoned the Irelands to check about his termination (as distinct from his pay). When asked why he did not try to find out what was going on, Mr Ottesen said that he was not sure. On the other hand the Irelands accepted that they did not contact Mr Ottesen directly themselves after hearing that he had resigned.

[70] Graham and Annette Ottesen both gave evidence that they had wanted Mr Ottesen to stay working for them.

Was Mr Ottesen dismissed?

[71] In order to succeed in his personal grievance claim Mr Ottesen must establish that he was dismissed. If he can do so, the onus then shifts to the Irelands to prove that their actions were what a fair and reasonable employer could have done in all the circumstances.

[72] Mr Ottesen says that he was advised that he was dismissed, by Ricky Ireland on 23 June 2016. Although it was said that the dismissal was done in anger at Mr Ottesen seeking help, it was also said that the reason given for dismissal was the relocation of the truck.

[73] Mr Ottesen’s case included the suggestion that having a single day off sick had caused Graham Ireland in particular, to decide that the truck would now be based at Huntly so that a substitute driver could drive it in such circumstances. This was a

change from the previous decision to leave it in Te Puke. Graham Ireland's evidence was that drivers get sick. He also says that he did not have a particular substitute driver in Huntly. I accept Graham Ireland's evidence in this regard. It seems unlikely that there would be a significant change in decision when an employee had one day off on sick leave.

[74] The Irelands say that Mr Ottesen had resigned, that he was not dismissed, and that he had nothing so bad that would warrant dismissal. They wanted to keep him working for them.

[75] The Irelands' case is that Mr Ottesen resigned because he did not like staying away from his wife and family and was more worried about this with the change to the new contract. Although the possibility of overnight stays away from home had existed with Transflow, Ricky Ireland says that the Transflow dispatcher had arranged for Mr Ottesen to have every night possible home.

[76] The Irelands further argued that Mr Ottesen wanted to keep the fact that he had initiated his departure from the Ireland job from his wife. Ricky Irelands says that when they discussed it, Mr Ottesen did not know how to tell his wife because she was happy to be getting a \$1,000 weekly wage coming in from Mr Ottesen's work.

[77] Facebook entries by Mr Ottesen were filed by the Irelands. These referred on a number of occasions to Mr Ottesen's strong dislike for being away from home, including a reference to how lonely he was.

[78] Although Mr Ottesen's brief of evidence referred to his moves (between trucking jobs) jobs as being for better and better employment as he moved between Hamilton and Tauranga, the Facebook entries create a different impression, including short periods of employment and jobs not working out for him.

[79] There were aspects of the scenarios put forward by both parties which were somewhat unlikely or without any apparent foundation. For example, during cross-examination Mr Ottesen for the first time raised the possibility that Ricky Ireland may have been questioning Mr Ottesen's abilities or position from when he pranged the truck's trailer previously and effectively that that may have been the start of the road to dismissal.

[80] In final submissions on behalf of Mr Ottesen it was suggested that Ricky Ireland had sought to destabilise Mr Ottesen's employment stability by leading him to believe that the truck was being moved to Huntly. Why he would have wanted to do this is not suggested.

[81] It was argued that Mr Ottesen would not have resigned without another job to go to, due to the family's financial position. I certainly accept that he may have been reluctant to do so, however, there may have been other reasons which could overwhelm this. He also had a job interview lined up.

[82] I also accept the submission by the Irelands that Mr Ottesen's behaviour after what he said was summary dismissal effectively by Ricky Ireland in a moment of anger, is not what one might normally have expected.

[83] Mr Ottesen continued working the next day driving a multiple drop-off load to Auckland, then picking up a new load. He was unable to deliver the load that night, so he went to do it the next day but the truck broke down. Mr Ottesen tried to get assistance from Ricky Ireland but when unable to called the mechanics and waited for them to come. He took the truck back to his house and washed it. He was involved in a friendly exchange of texts with, including a finally message to Ricky Ireland stating "Wicked man I'll make sure I'm up" and including a smiley face [:)].

[84] I do not consider that Mr Ottesen has met the onus of proof to establish that he was dismissed. Although it was a close matter, I consider it more likely than not that Mr Ottesen resigned from his employment with Irelands.

[85] Overall I consider that Ricky Ireland's evidence was more credible than Mr Ottesen's evidence. It was more consistent both within itself and with the documentation. My impression was that Mr Ottesen was not confident in her evidence at some critical points, having problems recalling and needing to check his brief of evidence in order to respond. This related to more than just dates, but to the substance of important discussions.

[86] Having found that he left of his own volition, Mr Ottesen cannot establish an unjustified dismissal personal grievance.

Wages

[87] Mr Ottesen claims that he has underpaid for his final two weeks of pay. When he contacted Ricky Ireland a week after he finished work, Ricky Ireland said that the final pay was what was considered to be fair. A deduction of \$200 was made for money loaned to him by Ricky Ireland and a day's pay for what was described as him just walking off. In her witness statement Mrs Ireland acknowledged that they were wrong to make the deductions (from a legal perspective).

[88] Under the Wages Protection Act 1983 no deductions are to be made from wages payable to a worker except in accordance with the Wages Protection Act⁵.

[89] The Wages Protection Amendment Act 2016 made changes to section 5 of the Wages Protection Act regarding deductions with a worker's written consent. However, these changes only came into effect from 1 April 2016, after the deductions were made by the Irelands. Mr Ottesen's case is therefore considered under the provision in place until 31 March 2016. This provided that an employer may make deductions from wages for any lawful purpose with the written consent of the employee or on their written request⁶.

[90] Although Ricky Ireland says that Mr Ottesen told him to deduct the money from his final wages, this was not in writing. Mr Ottesen did not seem clear, when asked, what the repayment arrangements were.

[91] Clause 15.4 of the employment agreement provides for deductions for salary where requested by the employee and for any overpayments made for leave taken in advance.

[92] I am satisfied that neither of the deductions here came within the category of over payments for leave taken in advance. There was also no evidence of Mr Ottesen having requested either of these deductions. Therefore I am not satisfied that these deductions should have been made and now look at how much Mr Ottesen is owed.

[93] For his final full week of work covering 16 June to 22 June 2016 Mt Ottesen should have been paid for four days⁷ which would be \$1014.40 gross. However he

⁵ s 4

⁶ s 5 (1)

⁷ Unpaid sick leave on 19.06.16 (having not reached six months' service)

was only paid was paid \$974.00 gross. They owe Mr Ottesen the difference, being \$40.40 gross for this period.

[94] For Mr Ottesen's final partial week of work he worked two ordinary days⁸ and a three hour day on 25 June 2015. He was only paid \$312.00 gross as the Irelands deducted one day's pay for what his wages records refer to as a "walkoff". Mr Ottesen should have been paid \$561.54. There is no provision in the employment agreement allowing the Irelands to deduct money from salary for any inadequate notice given. They therefore owe Mr Ireland the difference, being \$249.54 gross.

[95] I order the Irelands to pay Mr Ottesen within 14 days of the date of this determination the sums of \$289.94 (being \$40.40 and \$249.54), and \$23.20 (8% in addition as holiday pay), totalling \$313.14 gross.

Costs

[96] Costs are reserved. The parties are invited to resolve the matter themselves.

[97] Mr Ottesen has been unsuccessful in his personal grievance claim but has been awarded a modest sum of wages. The Irelands have not had independent representation so it would be unusual for them to be awarded costs.

[98] If the parties are unable to reach agreement they shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority

⁸ 23 and 24 June 2015