

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 319
3038291

BETWEEN DEREK SPEIRS
 Applicant

AND FOOTE & CO LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 No appearance for the Respondent

Investigation Meeting: 12 October 2018

Determination: 12 October 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Derek Speirs worked as a truck driver for Foote & Co Limited (FCL) from 5 February to 22 July 2018. In an application to the Authority Mr Speirs said his final wages were paid on 29 July 2018 but did not include holiday pay owed to him. He said FCL's director Paul Foote had responded to a Ministry of Business employment standards inquiry and confirmed Mr Speirs' gross earnings totalled \$22,789 during the employment. Mr Foote had not however subsequently responded to Mr Speirs' request for his holiday pay.

[2] FCL did not lodge a statement in reply to Mr Speirs' application to the Authority. Courier records confirmed a copy of that application and information about the need to reply was delivered to and signed for at FCL's registered office on 11 September 2018.

[3] By Minute on 2 October 2018 I advised the parties that this application would be dealt with in an investigation meeting to be held by telephone conference on 12 October. The Minute outlined the likely orders that would be made and advised that

an FCL representative could attend by telephone and be heard, even though it technically required leave to provide any statement in reply.

[4] Courier records confirm that the Minute and the Notice of Investigation Meeting were delivered to and signed for at FCL's registered office on 5 October 2018. The documents were also sent to an email address that Mr Foote appeared to use for business.

[5] At the appointed time of the investigation meeting Mr Speirs was contacted by telephone. FCL had not replied to the invitation to provide telephone contact details for a representative to participate in the investigation meeting by telephone. As FCL was given ample opportunity but had not engaged in the Authority process I have proceeded to determine Mr Spiers' application on the basis advised to the parties in the 2 October Minute.¹

The Authority's investigation

[6] In the telephone conference Mr Speirs confirmed he had not received his holiday pay and had no further contact from Mr Foote about the issue. On the basis of the information from Mr Speirs and the failure of FCL to respond or participate in the Authority's investigation, it was appropriate to proceed to make the orders that the parties were advised in the 2 October Minute were likely to be made.

Compliance order: payment of holiday pay with interest

[7] Mr Speirs was entitled to be paid the sum of 1,823.12 in holiday pay at the end of his employment. He is entitled to an order for that amount, less any applicable tax. As he has been deprived of the use of that amount from 23 June 2018 it was also appropriate to order interest from that date to the date of payment.²

Penalty: failure to pay holiday pay

[8] Under s 23 of the Holidays Act 2003 FCL was obliged to pay Mr Speirs holiday pay at the end of his employment calculated at eight per cent of his gross earnings. Failure to do so made the company liable for a penalty of up to \$20,000.³

¹ Employment Relations Act 2000, s 173(2) and Schedule 2 clause 12.

² Holidays Act 2003, s 84.

³ Holidays Act 2003 s 75.

[9] A penalty was appropriate in this case because FCL had breached a basic statutory right. Its failure to engage in the Authority process suggested FCL's breach was deliberate. A penalty was appropriate to punish FCL and to deter other employers behaving in the same way.

[10] Assessment of the appropriate level of penalty starts from the provisional level of \$20,000 for the single breach of the failure to pay Mr Speirs' holiday pay.⁴ Allowing for the relative seriousness of the breach and no information of any prior proceedings for similar conduct the provisional level of the penalty could be adjusted to 75 per cent of that amount. While the deliberate nature of the breach was an aggravating factor, with no ameliorating factors identified, a proportional outcome suggested a further adjustment to a penalty of \$1,000 was consistent with the range of awards in cases with similar breaches.⁵ There was no information suggesting FCL would be unable to pay a penalty of that amount.

[11] Accordingly FCL must pay a penalty of \$1000 for its breach of s 23 of the Holidays Act. The penalty must be paid directly to Mr Speirs as the person who was the victim of the company's breach.⁶

Reimbursement of Authority application fee

[12] FCL must also reimburse Mr Speirs for the cost of the \$71.56 fee he paid to lodge his application in the Authority.

Orders

[13] As a result of this determination, FCL must pay Mr Speirs the following sums within seven days of the date of this determination:

- (i) \$1,823.12 as holiday pay, less any applicable tax; and
- (ii) Interest on that amount, at the rate of 5 per cent, from 23 June 2018 to the date of payment; and
- (iii) \$1000 as a penalty for a breach of the Holidays Act 2003; and
- (iv) \$71.56 fee in reimbursement of the fee paid to lodge his application in the Authority.

⁴ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 at [152]-[198]

⁵ See, for example, *A Labour Inspector v Gengy's Management Limited* [2017] NZERA Auckland 333.

⁶ Holidays Act 2003, s 76(6).

[14] As noted in the 2 October Minute, should the company fail to comply with these orders, Mr Speirs is able to file the Authority determination with the District Court and have the orders enforced by the court bailiffs: s 141 of the Employment Relations Act 2000.

Robin Arthur
Member of the Employment Relations Authority