

[3] OIL denies having ulterior motives for disestablishing the position Mr Sykes performed. It says following an independent review of the company there was a genuine need to revise the Operational Manager's position. It notes Mr Sykes was offered the new Operations Manager position but declined to accept it.

[4] This determination has made findings of fact and law necessary to dispose of Mr Sykes' claims. As is permitted by s 174 of the Employment Relations Act 2000 ("the Act") I have not referred to each item of evidence or every aspect of submissions furnished to the Authority over the course of the investigation. All information received has been carefully considered.

Relevant background information

[5] OIL was founded in 1998 by Mr Sykes and his uncle. The business has achieved success through a business model where it obtained long term leases over a number of apple producing orchards which it manages in four separate sub-regions of Hawkes Bay.

[6] The arrangement between Mr Sykes and his uncle is said to have been informal. Mr Sykes managed the day to day operational aspects of the business. His hours were not set, and he was able to self-determine when and how he performed work for OIL.

[7] Concurrent with his activities for OIL, Mr Sykes was employed by Mr Apple Ltd (Mr Apple) in 2004 as its Post-Harvest Planning and Logistics Manager. At the time of the Authority's investigation he remained in this position. Mr Sykes says this role too does not have set hours but requires him to be available when necessary. He estimates his weekly hours of work for Mr Apple are between 40-50 during harvest and 22.5 during the off season.

[8] There is also a commercial relationship between OIL and Mr Apple. According to its website, Mr Apple produces and exports 25% of the New Zealand annual apple crop. Separate to its own produce, OIL is Mr Apple's primary external supplier of apples.

[9] In 2017 OIL appointed a Board of Directors and set about implementing a corporate structure. In early 2018 Mr Mark O'Donnell commenced in the newly-created position of General Manager.

[10] Relatively soon after his appointment, Mr O'Donnell endeavoured to ensure OIL was compliant with employment-related documentation. To this end he sought to obtain

agreement with Mr Sykes regarding terms and conditions of employment and a job description.

[11] In an email dated 19 April 2018 and sent to Mr Sykes, Mr O'Donnell recorded:

As discussed at today's meeting I have made a number of agreed amendments to your contract which is now ready to sign (attached).

[12] A dispute between Mr Sykes and his uncle regarding ownership of the company emerged in or around late April 2018 and the written employment agreement was not executed. At the Authority's investigation Mr Sykes said he was unwilling to sign the agreement because he did not want to prejudice his shareholding claim.

[13] No evidence was produced to demonstrate that Mr Sykes did not accept the terms set out in the employment agreement. On balance I am satisfied the terms contained within the document governed the relationship.

[14] In mid-2018 the Board Chairman commissioned Staples Rodway, (Chartered Accountants) to undertake a review of the company's structure. Staples Rodway provided a report to the Board on 23 July 2018.

[15] Relevant to this determination, the report noted Mr Sykes' employment with Mr Apple and observed:

In our view there is an inherent conflict of interest in these arrangements.

Our interpretation of the risks arising from this situation is as follows

- it seems difficult to believe that one person can effectively fulfil two full-time roles
- there is inevitably likely to be situations where loyalty will be called into question, e.g. during the height of picking/packing season
- the arrangements between the two companies have potentially been less than commercial in the past, eg informal staff sharing.

[16] Amongst other things, Staples Rodway recommended:

"Roberts ongoing role within the company, if there is to be one, needs to be clarified, agreed and documented, probably concurrent with [resolution of the ownership issues]."

[17] By the beginning of the final quarter of 2018 it was apparent the shareholding issue would not be resolved in the short term. That matter is now before the courts of ordinary jurisdiction.

[18] Between October and December 2018 OIL attempted to revisit the content of a position description for the Operations Manager position. Mr Sykes resisted becoming involved with documenting the role.

[19] Following an instruction by the Board to address the Staples Rodway recommendations as they concerned the Operations Manager role, on 16 January 2019 Mr O'Donnell attached a copy of the report and wrote to Mr Sykes. He advised he wanted to eliminate the risks identified in the report. Mr O'Donnell proposed to disestablish the current Operations Manager role and create a new position. He noted the incumbent:

“ ... will be required to be available to carry out their duties and responsibilities throughout normal business hours (Monday to Friday, 40 hours per week), plus any additional hours which are reasonably necessary to fulfil the requirements of the role, or as reasonably required by OIL”.

[20] Mr O'Donnell advised that the holder of the position could not, as a term and condition of employment, undertake secondary employment without written permission from OIL.

[21] A series of communications between the parties' legal representatives followed. The areas of dispute in that exchange largely form the basis to Mr Sykes' claims before the Authority. I shall return to these matters.

[22] On 3 April 2019 Mr O'Donnell communicated OIL's decision to disestablish the then Operations Manager position. Mr Sykes was offered the revised Operations Manager position on terms and conditions foreshadowed in its letter of 16 January 2019. The letter advised that, if he did not accept the position, his role would finish on 17 April 2019 being two weeks' notice.

[23] On 9 April 2019 Mr Sykes' lawyer advised that Mr Sykes could not accept a position where he was barred from his secondary employment. No other position was identified to which Mr Sykes could be deployed.

[24] On 12 April 2019 Mr O'Donnell wrote again to Mr Sykes' representative. He alleged Mr Sykes had shared confidential information with an Orchard Manager amounting to a breach of fidelity, and that he had made statements that undermined both OIL's governance and management. Mr O'Donnell advised OIL was exercising its discretion to pay Mr Sykes' notice period in lieu of work. Mr Sykes was not required to attend OIL as of that date but would be paid to 17 April 2019.

The Authority's investigation

[25] On Friday, 12 April 2019 Mr Sykes, through his solicitor, lodged an application for interim reinstatement.

[26] A case management conference call was held on Wednesday, 17 April 2019. Amongst other things the parties were directed to mediation and, by his counsel, Mr Sykes agreed to withdraw the application for interim reinstatement in exchange for an early substantive meeting. The parties were unable to resolve their differences and the Authority's investigation went ahead on 17 and 18 June 2019.

[27] Mr Sykes and Mr O'Donnell both provided written and oral evidence to the Authority. An affidavit was produced by Mr Peter Drury, CEO of Mr Apple, but he was not required to answer questions from the Authority or the parties. A sector manager for OIL, Mr Chris Jones, provided evidence on the second day of the investigation.

Relevant law

[28] In *GN Hale & Son Ltd v. Wellington Caretakers IUOW* the Court of Appeal said:¹ :

An employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him.

[29] More recently, in *Grace Team Accounting v Brake*² the Court of Appeal observed that if an employer can show that a redundancy is genuine and the consultation requirements have been met then the test of showing that the dismissal is justified is likely to be met.

¹ [1991] 1 NZLR 151
² [2014] NZCA 541

[30] The Court of Appeal emphasised that an assessment of these matters should be determined by s 103A of the Employment Relations Act 2000 (the Act).

[31] Section 103A requires the Authority to objectively assess whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done at the time the dismissal or action occurred.

The issues

[32] Applying s 103A to the circumstances of this case, the Authority needs to determine whether there were substantive grounds for which OIL could disestablish the original Operations Manager position, and whether the process used to do so was undertaken fairly.

[33] The particular issues to be determined are as follows:

- (a) Whether it was reasonable for OIL to commence a process to revise the terms and conditions of Mr Sykes' employment, and if so;
- (b) Whether the reasons for which OIL sought to alter the role were based on genuine business purposes;
- (c) Whether OIL properly consulted with Mr Sykes regarding the proposal;
- (d) Whether OIL breached its obligations of good faith:
 - (i) when it did not meet with Mr Sykes face to face;
 - (ii) by providing him with a file note with incorrect information;
 - (iii) by speaking with Mr Apple regarding the redundancy process.
- (e) Whether OIL's decision to place Mr Sykes on garden leave without providing him an opportunity to comment on the matter was a breach of good faith;
- (f) If OIL did breach its obligations of good faith, whether Mr O'Donnell aided and abetted OIL to breach those obligations;
- (g) Whether Mr Sykes is owed holiday pay.

Were there substantive grounds to disestablish the Operations Manager position?

Was it reasonable for OIL to commence a restructure process?

[34] Mr Sykes disputes the reasons for which OIL proposed to revise the Operations Manager position as insufficient to trigger a redundancy in any event. There are several aspects to this challenge.

[35] Firstly, there is a suggestion that Mr Sykes was already undertaking the work in the way envisaged by the proposal: “*normal business hours (Monday to Friday, 40 hours per week) plus any hours which are reasonably necessary*”.

[36] During consultation Mr Sykes’ work pattern for OIL was described by his counsel as follows:

“[Mr Sykes] works on average 35-40 hours per week and makes this time up over weekends, mornings, evenings and sometimes during the day. He rarely attends the office and devotes most of his time to overseeing orchards, planning and directing OIL’s four sector managers on the technical aspects of production.”

[37] I need to note the parties disagree as to the quantum of hours Mr Sykes worked each week. OIL estimates these were likely to be 20 per week, or thereabouts. Setting that issue aside, OIL does not dispute Mr Sykes carried out work for OIL on weekends and evenings.

[38] Mr Sykes’ oral testimony referred to a range of times by which he might visit OIL’s external orchards, but I am satisfied his attendance at OIL sites during normal business hours was irregular and unpredictable. By his own evidence he concedes his presence at OIL’s orchards was variable in terms of timing, and that he rarely attended the main site office other than to attend a weekly meeting.

[39] Overall, Mr Sykes’ evidence leads me to conclude he performed his role for OIL around his work commitments to Mr Apple.

[40] I accept there was no certainty for OIL as to when exactly Mr Sykes was conducting work for it, or where he undertook his duties. It follows that I am not persuaded his hours of work may be fairly characterised as “*essentially*” conforming to OIL’s proposal to have the Operations Manager work normal business hours. The evidence does not support this proposition.

[41] On the premise that Mr Sykes' appraisal concerning the number of hours he worked is correct, he submits the only material change between the role he performed and the revised position was when the work was done.

[42] Counsel for Mr Sykes refers to *ANZ National Bank Ltd v Svensson*³ to say a reorganisation of hours does not amount to a redundancy. In that instance the Court held that the employer's proposal to have an employee perform her role over five days instead of four, did not result in the position becoming superfluous. The case was largely determined by an application of terms within the parties' collective employment agreement. The Court noted there were provisions specific to circumstances where either party sought to vary hours of work which were better suited to the dispute than the redundancy provisions.

[43] I am not persuaded that a reorganisation to hours of work could never result in a genuine redundancy. Notably, in *ANZ* the Court observed "*The question of whether a position is superfluous is a matter of fact and degree*".⁴

[44] The circumstances of this case are quite different to those in *ANZ*. Here, there was no contractual arrangement specific to how either party could seek to alter the hours of work associated with the Operations Manager position.

[45] Counsel for Mr Sykes says the matters on which OIL wanted to effect change should have been addressed by informal discussion and negotiation between the parties. I agree this approach was available to OIL.

[46] OIL's proposal to have the Operations Manager present on its sites at set daytime hours, where these had previously been flexible and irregular, represented, in itself, a fundamental shift to the way OIL wanted the role to be performed. In this respect I do not consider it necessary to determine the quantum of hours Mr Sykes worked so as to assess whether OIL could reasonably view the role, as then performed, as superfluous.

[47] I am satisfied that the proposal to alter *when* Mr Sykes worked would, alone, result in a substantial and significant alteration to terms and conditions of employment if effected. The nature of the proposal leads me to conclude that it was open to OIL to commence a formal process of consultation with Mr Sykes regarding the requirements of the role.

³ (2008) 6 NZELR 44; (EMC)
⁴ Above

Were there genuine business reasons to restructure?

[48] The next inquiry involves an assessment as to whether OIL's decision to make the original Operations Manager position redundant was for genuine business purposes at the time it was made.

[49] Mr Sykes challenges OIL's reliance on the Staples Rodway report as reason for the change to position where there is no express recommendation of that nature in the document. I am not persuaded by his position on the point.

[50] The Staples Rodway report was obtained against a background where OIL wanted to ensure its corporate and management structures were appropriate. The report itself records the review was commissioned to examine its structure "*in line with Institute of Directors best practice*". No evidence was produced to persuade me that the report was engineered for an ulterior purpose. I am satisfied the recommendations made by Staples Rodway demonstrate the genesis for the changes OIL proposed in regards to the Operations Manager position.

[51] It is common ground that the Operations Manager role is effectively a 2IC position. OIL urges the Authority to consider the justifiability of the proposed alterations to the position given its status within the company and in circumstances where OIL is in a period of significant development.

[52] I find Mr Sykes' assertion that OIL's proposal to have him on site during day time business hours plus on weekends and public holidays where necessary would result in a 24 hour role overstates OIL's proposal. OIL's requirement to have its Operations Manager visibly present on its sites and dedicated exclusively to the role during weekday business hours was a reasonable response to its expanding business environment. Mr Sykes was entirely cognisant of OIL's expectation that its crop would double over the next four years, and did not dispute OIL anticipates a 22% increase in growth over the following year.

[53] I further accept OIL's position (as conveyed to Mr Sykes during consultation between the parties) that, if the role continued to be undertaken outside normal business hours, it derived little value from it where sector managers (who reported to the position) were not (generally) working at those times. I am not persuaded OIL needed to provide any additional rationale to support its proposal to have Mr Sykes work at its sites when operations were largely being undertaken.

[54] A point of dissent between the parties concerns the substantive justification of OIL's proposal to require the holder of the Operations Manager position to seek permission from it to obtain secondary employment.

[55] Mr Sykes says OIL has not been able to provide a real or proven instance of a conflict of interest arising as a result of his employment with Mr Apple.

[56] His assertion is undermined by an incident that occurred in late January 2019. On or about 28 January 2019, in a meeting held between OIL and Mr Apple, issues regarding a change to staffing on OIL's orchards was discussed. OIL had prepared a note advising the issue was confidential. Mr Sykes was not present at the meeting but the information is said to have been conveyed to him by Mr Apple for reasons associated with his employment with it. At the Authority's investigation meeting sworn evidence was given which persuades me that it is more likely than not that Mr Sykes subsequently informed an OIL sector manager about the staffing issue.

[57] I accept it is unlikely that Mr Sykes was aware the matter was regarded as confidential. But the incident tends to demonstrate a real potential for conflicts of interest to arise from Mr Sykes' employment with it and Mr Apple at the same time.

[58] It is perhaps understandable that Mr Sykes perceived OIL's changed attitude towards his employment with Mr Apple with scepticism given it had previously been tolerated but, objectively viewed, there can be no real dispute that the arrangement presented a risk for OIL. I am not persuaded that OIL sought to restrict Mr Sykes' employment with Mr Apple as a means to fetter his ability to fund his legal action against his uncle. There is no evidence to support that position.

[59] I am satisfied that it was reasonable for OIL to conclude that the Operations Manager role, as it was then performed, no longer met its growing business demands and had become superfluous. Notwithstanding the January incident, the content of the Rodway Staples report regarding secondary employment provided a reasonable basis for OIL's proposal to have the Operations Manager role answer to one master. Overall,

[60] I find the decision to disestablish the original Operations Manager role was one that a fair and reasonable employer could have made in all the circumstances at the time it occurred.

Was the procedure to disestablish the Operations Manager position fair and reasonable and conducted in good faith?

[61] The second portion of the Authority's assessment concerns whether the process used to disestablish the Operations Manager position was one that a fair and reasonable employer could have used in all the circumstances.

[62] The inquiry is informed by s 103A(3) which sets out minimum standards of procedural fairness and whether the employer, pursuant to its good faith obligations, provided Mr Sykes with sufficient information relevant to the continuation of his employment to enable him to comment on it before a final decision was made.

[63] I am unwilling to conclude OIL did not properly consult with Mr Sykes in respect of the proposal, or that OIL breached its obligation of good faith by refusing to meet face to face with Mr Sykes.

[64] Both parties were represented by experienced legal counsel throughout the 11 weeks in which consultation occurred. At least 10 items of correspondence were exchanged on the matter. The content of that material reflects fulsome discussion by both parties on the issues driving the proposal. It is clear OIL had a working plan in mind but there is no evidence the matter was predetermined or a charade.

[65] On 25 January 2019 counsel for Mr Sykes asked to meet to discuss the matter. On 4 February 2019 OIL advised it was not necessary, but extended the timeframe to provide additional feedback on or by 11 February 2019. In a letter dated 20 February 2019 counsel for Mr Sykes again requested to meet. On 8 March 2019 OIL communicated its availability to meet on 12 March 2019. It advised that if Mr Sykes did not attend he had until 14 March to provide further comment. On 11 March 2019 counsel for Mr Sykes said he had not been instructed and requested the parties meet a week later. OIL advised any further delay was unreasonable.

[66] I am not persuaded OIL's omission to meet face to face with Mr Sykes demonstrates a breach of good faith. While it is common, in a consultation setting, for parties to convene and address their respective positions, good faith does not require parties to meet face to face to fulfil obligations to be responsive and communicative. This claim is dismissed.

[67] Next, it is alleged that OIL failed to provide Mr Sykes an opportunity to comment on a matter leading to OIL's decision to disestablish the role. The claim arises from the circumstances described below:

[68] In the letter of 3 April 2019 which communicated OIL's decision, Mr O'Donnell referred to Mr Sykes' flexible work arrangement. Amongst other things, he said he had considered an incident on 29 March 2019 whereby Mr O'Donnell had called Mr Sykes twice to arrange a meeting later in the day. During the second call Mr Sykes conceded he was in Auckland and not available to meet.

[69] The letter recorded Mr O'Donnell's concern that Mr Sykes had not informed him of his whereabouts and that he did not consider it to be an isolated incident. Mr O'Donnell concluded the matter stating:

Given the above, in my view any "flexible work arrangement" that you consider to be in place is certainly not appropriate and is not in the best interests of OIL.

[70] Best practice would likely require OIL to have allowed Mr Sykes an opportunity to comment on the incident. However, I accept OIL did not raise the matter as a disciplinary issue. Rather, it was referenced to provide context to its decision regarding the flexible work pattern. I do not understand Mr Sykes asserts his work pattern was otherwise. On balance, I do not accept the event formed the basis on which OIL relied upon to disestablish the Operations Manager position. It was not therefore information that was relevant to the continuation of the position for which OIL was obliged to seek a response.

[71] Mr Sykes takes issue with the content of a file note provided to him in response to an information request. The file note, drafted by Mr O'Donnell, concerned the events leading to the conflict of interest incident in late January 2019. The file note contained a factual error which was corrected prior to OIL reaching a decision on the restructure. I am unwilling to conclude that the initial provision of the file note was a breach of good faith.

[72] Mr Sykes also alleges that an "off the record" discussion between Mr O'Donnell and the CEO of Mr Apple was a breach of good faith. There is no evidence that OIL disclosed additional information about the proposal that Mr Sykes had not already been made aware of.

[73] The instances by which Mr Sykes alleges OIL breached its obligation to act in good faith while it consulted with him regarding its proposal have not been established. It is my

conclusion that the process followed by OIL in concluding the Operations Manager role should be disestablished was within the scope of what a fair and reasonable employer could have done in all the circumstances.

[74] It was open to Mr Sykes to accept the revised role and avoid dismissal but he chose not to do so. His personal grievance claim that he was unjustifiably dismissed has not been established.

Was OIL obliged to seek Mr Sykes' comment regarding payment of notice?

[75] Mr Sykes alleges OIL was in breach of good faith by failing to provide him an opportunity to comment on the concerns raised by OIL as reason to pay his notice period in lieu of Mr Sykes working.

[76] OIL refers to the *Termination of Employment* provisions in the employment agreement at clause 19.1, as the basis for its decision to place Mr Sykes on garden leave, as follows:

You may be paid in lieu of ... notice at the discretion of the employer.
Alternatively, the Employer may, during the notice period, require you not to attend work or the workplace ...

[77] OIL was entitled to rely on clause 19.1. It follows that OIL was not obliged to provide Mr Sykes a right of reply to OIL's decision to require him not to attend work during his notice period. This claim is also dismissed.

Did Mr O'Donnell aid and abet a breach of good faith?

[78] A breach of good faith on behalf of OIL has not established. It follows that Mr O'Donnell cannot have aided and abetted the breaches alleged.

Is Mr Sykes owed holiday pay?

[79] Mr Sykes claims he is owed holiday pay accrued between 22 October 1998 and the end of his employment on 17 April 2019. Although the claim was not initially quantified, submissions on behalf of Mr Sykes now state he is owed \$39,714.01 in outstanding holiday pay.

[80] The claim draws attention to the course of the relationship between the parties at various junctures. There is no dispute that OIL paid Mr Sykes a salary between 7 October

2001 and 31 July 2005. Salary payments commenced again on 4 July 2016 until his employment ended. The nature of the financial exchange between Mr Sykes and OIL during the intervening period was not clear from the evidence, but Mr Sykes submits he remained an employee throughout.

[81] OIL submits the only relevant period to be considered for the holiday claim is the period of 4 July 2016 to 15 April 2018. It says Mr Sykes' claim is limited to the 6 years immediately prior his raising the claim - in this case beginning 10 May 2013. OIL further casts doubt on whether Mr Sykes could be regarded as an employee between mid-2005 and mid-2016 when he was not remunerated as an employee. Next, it says even if Mr Sykes was an employee, the value of any holiday pay accrued over that period must be zero where salary or wages were not paid. Finally, OIL says Mr Sykes was paid holiday pay at a rate of 8% alongside his weekly salary payments in the 12 months prior to the end of his employment.

[82] I am not persuaded by OIL's position on this matter.

[83] I am unwilling to find Mr Sykes' employment terminated in mid-2005 when he ceased receiving a salary. The employment agreement negotiated by the parties in 2018 states the agreement "*will come into force on 24 November 1997 and continue until it is terminated in accordance with the terms of the agreement*". There is no evidence that his employment terminated before April 2019. I find Mr Sykes was an employee over the material time frame for which he claims and entitled to annual leave over the same period. Further, it is accepted law that entitlement to payment for leave not taken before termination of employment does not crystallise until the date of termination.⁵

[84] Nor do I accept the view that annual leave accrued over the period in which Mr Sykes received shareholder's distributions necessarily has no value. Calculation of payment for annual leave must be in accordance with the Holidays Act 2003.

[85] Mr Sykes performed payroll administrator tasks until 2010 but little evidence was provided as to when Mr Sykes took annual leave. Mr Sykes provided a document recorded by OIL's then payroll provider which he says reflected his annual leave entitlement as at 27/07/2016.⁶ The document records 56.44 days were owed. No additional holiday and leave

⁵ *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 112 at [27] citing *Burns v Radio Pacific Ltd* [1998] 3 ERNZ 559, & *Napier Aero Club Inc v Tayler* [1998] 1 ERNA 214

⁶ Agreed Bundle of Documents, document 50

records or evidence were furnished by either party to support or contradict the accuracy of the payroll document and I accept its contents.

[86] In or around April 2018 OIL obtained a new payroll service provider and OIL says Mr Sykes began receiving holiday pay alongside his weekly pay. The Authority was supplied with several weekly payslips generated before the change as well as subsequently. The earlier payslips record Mr Sykes' weekly gross earnings as \$1623.10 per week, whereas in the later the sum is \$1623.06 – a difference of four cents. All payslips record Mr Sykes' net pay as \$1,000 per week. If Mr Sykes had received holiday pay as well as his fixed salary rate the 2018/19 payslips should reflect an increase to the quantum of weekly gross earnings by 8%. They do not. It appears that 8% of the salary rate has simply been re-characterised as holiday pay. I am not satisfied Mr Sykes was paid holiday pay between 18 April 2018 and 17 April 2019.

[87] Section 24(2) of the Holidays Act 2003 provides that, when employment ends, holiday pay must be paid at a rate that is based on the employee's ordinary weekly pay as at the date of the end of employment, or average weekly earnings during the 12 months immediately before the end of the last pay period before the end of employment.

[88] Whilst I consider it highly likely Mr Sykes took more than occasional "ad-hoc" holiday days over the course of his employment, in the absence of holiday and leave records I have been unwilling to speculate as to the frequency or otherwise of annual leave taken and those matters have not been included in the Authority's calculations.

[89] I have assessed the 56.44 holiday days accrued as at 27/07/2016 date equates to 11 weeks and 1.44 days. Payment of holiday pay for this period is \$18,321.10 (gross).⁷

[90] Mr Sykes is also entitled to payment of 8 weeks annual leave accrued in the two years between 27/07/2016 and 26/07/2018. Payment of holiday pay for this period is \$12,984.48 (gross).⁸

[91] Mr Sykes is further entitled to 8% of gross earnings for the part-year between 27/07/2018 and his employment ending.⁹ Payment of holiday for this period is \$4,908.13 (gross).

⁷ 11 weeks (at 5 days per a week) plus 1.44 days x weekly gross earnings
⁸ 8 weeks x weekly gross earnings of \$1,623.06

Summary of findings and orders

- (a) Mr Robert Sykes was not unjustifiably dismissed by Orchard Investments Ltd. His claim for reinstatement therefore also does not succeed.
- (b) Orchard Investments Ltd did not breach its obligations of good faith.
- (c) Orchard Investments Ltd is ordered to pay outstanding holiday of \$36,213.71 minus PAYE: refer para [89] – [91].

Costs

[92] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

⁹ 8% of gross earnings between 27/07/2018 and 17/04/19 [37 weeks & 4 days]