

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 167
5556003

BETWEEN

SANDRA WATKINS
Applicant

A N D

INSITE SECURITY AND
INVESTIGATION SERVICES
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: C Rowe, Advocate for Applicant
C Martin, Advocate for Respondent

Investigation Meeting: 12-13 April and 10 May 2016 at Whangarei

Submissions Received: 16 November 2015, 4 and 10 May 2016 from Applicant
17 December 2015, 9 and 10 May 2016 from
Respondent

Date of Determination: 27 May 2016

DETERMINATION OF THE AUTHORITY

- A. Insite Security and Investigation Services Limited is ordered to pay Sandra Watkins wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$21,885.12.**
- B. The applications for interest, penalty and non-publication orders are dismissed.**
- C. Insite Security and Investigations Services Limited is ordered to pay \$3,500 to Sandra Watkins as a contribution towards her costs.**
- D. Insite Security and Investigation Services Limited is to make payment by instalments of \$400 per month starting within 28 days of the date of the determination pursuant to 131(1A) Employment**

Relations Act 2000. It is a condition of this order the parties meet annually to review the amounts paid.

Employment relationship problem

[1] This matter is about when an employer may pay holiday pay with an employees pay - often referred to as the “pay as you go” system. Sandra Watkins alleges Insite Security and Investigation Services Limited wrongly paid her holiday pay with her pay. She also seeks payment for 26 alternative holidays not taken or paid out upon termination, interest and penalties.

Issues

[2] The issues for determination are:

- a) What payment is owed for annual leave pursuant to s.28(4) of the Holidays Act 2003 and s.131 of the Employment Relations Act 2000 (the Act)?
- b) What payment is owed for alternative holidays pursuant to s.60(2)(b) of the Holidays Act 2003 and s.131 of the Employment Relations Act 2000 (the Act)?
- c) Whether interest should be awarded for the wage arrears owed pursuant to s.84(2) of the Holidays Act 2003?
- d) Should a penalty be awarded to the applicant pursuant to s.75 of the Holidays Act 2003 and/or s.133(1)(a) or (b) of the Employment Relations Act 2000?

What payment is owed for annual leave?

[3] For approximately 7 years the respondent employee company, Insite Security and Investigation Services Limited, paid the applicant Sandra Watkins an additional 8% of her weekly ordinary pay as holiday pay with her weekly pay.

[4] Section 28 of the Holidays Act 2003 sets out the requirements for when holiday pay can be paid with an employees pay. The employee must be on a fixed term contract for less than 12 months or work on a basis that is so “intermittent or irregular” that it is impracticable for the employer to provide the employee with 4 weeks annual leave and they must agree in their employment agreement to receive holiday pay with their pay.

What was the basis of Ms Watkins' employment?

[5] Although the parties' employment contract stated Ms Watkins was a "fixed term part-time" employee, I am not required to treat this statement as determinative¹ because employment relationships can change over time.

[6] This is what occurred here. The evidence showed in the beginning Ms Watkins' employment may have been uncertain in length and frequency because this was a new business with no guaranteed continuity. However Anita Martin, a respondent director, conceded Ms Watkins had regular fixed shifts after 12 months and may have become a permanent part time employee. From that point onwards she was no longer on a fixed term contract or working intermittent or irregularly.

Did Ms Watkins agree to the payment of holiday pay with her pay?

[7] There was no evidence Ms Watkins agreed to her holiday pay being paid with her pay. The unilateral imposition of a "pay as you go" system and the evidence Ms Watkins raised concerns about the holiday pay system with Anita Martin in 2011² does not equate to consent. Therefore the respondent employer was not entitled to pay holiday pay with Ms Watkins pay.

How much annual leave is owed?

[8] The law requires that Ms Watkins be paid again for her 4 weeks annual leave for every year of employment where an employer is not entitled to pay holiday pay with her pay and it has continued for longer than 12 months.³

[9] The amount of annual leave owed is the greater of ordinary weekly pay or average weekly earnings for the period up to the anniversary of the start of her employment (27 February 2015) and 8% of gross earnings since the entitlement last arose⁴ (1 -15 March 2015).

[10] Ms Watkins' ordinary weekly pay at the end of her employment was \$494.00. Her average weekly earnings were 1/52 of \$30,956.94 (gross earnings for the previous

¹ Section 6(3) Employment Relations Act 2000.

² Appendix 7 Statement in Reply.

³ Section 28(4) Holiday Act 2003.

⁴ Section 21 and 25 Holidays Act 2003.

12 months prior to termination⁵) or \$595.33. Using the greater average weekly earnings of \$595.33 multiplied by the 28 weeks holiday pay equals \$16,669.24.

[11] The respondent stopped paying the applicant holiday pay with her pay in early 2015. A lump sum of holiday was paid with her final pay of \$218.12. This needs to be deducted from the final amount owed. Therefore the annual leave owed at termination is \$16,451.12.

What payment is owed for alternative holidays?

[12] Entitlement to alternative holidays arises where “the public holiday falls on a day that would otherwise be a working day for an employee” and “the employee works ... on any part of that day.”⁶ If entitlement has arisen, an employer “must provide the employee with an alternative holiday”.⁷ This entitlement remains in force until the employee has taken the holiday or been paid for the holiday.⁸

[13] The respondent agrees there are 22 alternative holidays owed. The parties disagree about payment for 4 further alternative holidays. Ms Watkins seeks payment for 4 further alternative holidays because she worked two shifts ending and starting on the same public holiday and is therefore entitled to two alternative holidays for the same public holiday. The affected public holidays were 25 April 2009 (ANZAC Day), 6 February 2010 (Waitangi Day), 25 April 2010 (ANZAC Day) and 6 February 2011 (Waitangi Day).

[14] I do not accept Ms Watkins’ argument. The purpose of the public holiday section of the Holidays Act 2003 is “to provide employees with an entitlement to 11 public holidays if the holidays fall on days that would otherwise be working days for the employee.”⁹ Ms Watkins’ argument would provide her with 12 public holidays in 2009, 2010 and 2011. This is clearly not what the Holidays Act 2003 was intended to do.

[15] Accordingly I determine the applicant is owed 22 not 26 alternative holidays. The relevant daily rate was \$247. Therefore the payment owed for the alternative holidays is \$5,434.00 (22 multiplied by \$247).

⁵ Sections 2 and 14 Holidays Act 2003.

⁶ Section 56(1) Holidays Act 2003.

⁷ Section 56(2)(a) Holidays Act 2003.

⁸ Section 56(3) Holidays Act 2003.

⁹ Section 43(a) Holidays Act 2003.

[16] Therefore Insite Security and Investigation Services Limited is ordered to pay Sandra Watkins wage arrears pursuant to s.131 of the Employment Relations Act 2000 totalling \$21,885.12.

Should interest be awarded for the wage arrears owed?

[17] I am empowered to award interest in any matter involving the recovery of money for the whole or part of the period between the date the cause of action arose and the date of payment.¹⁰

[18] The award of interest is discretionary.¹¹ There are no statutory rules or mandatory principles to be applied.

[19] The general purpose of the power to award interest is to enable the Authority to ensure that proper compensation is given to the applicant for any losses she may have suffered in being unable to use the money owed. There was no evidence of any losses to Ms Watkins from being unable to access her holiday pay since termination of her employment. This is unsurprising given she has had the benefit of receiving her holiday pay with her pay albeit incorrectly.

[20] The claim for non-payment of alternative holidays was raised belatedly at hearing. There is no evidence of detriment since the cause of action arose upon termination. I decline to award interest in the circumstances.

Should a penalty be awarded to the applicant pursuant to s.75 of the Holidays Act 2003 and/or s.133(1)(a) or (b) of the Employment Relations Act 2000?

[21] The tests for award of a penalty are well known.¹² An action for recovery of a penalty must be commenced “within 12 months after the earlier of when the cause of action became known, or should reasonably have become known”.

[22] Non-compliance with the Holidays Act 2003 is serious but this must be balanced by the legal consequences requiring the respondent pay Ms Watkins again her holiday pay at the end of her employment. There was little impact upon Ms Watkins of the non-payment of holiday pay. She never required holidays and was asked at times if she wished to take holidays. She received holiday pay during her

¹⁰ Section 84(2) Holidays Act 2003.

¹¹ *Day v Mead* [1987] 2 NZLR 443 (CA) at 463-464.

¹² See *Tan v Yang* [2014] NZEmpC 65;

employment and shall receive payment again. There is no evidence the respondent intended to deprive Ms Watkins of payment for holidays or to prevent her from taking holidays if required. There was evidence the respondent's breach stemmed from incorrect accounting advice.

[23] In my view this matter does not meet the threshold for imposition of a penalty. Even if it warranted imposition of a penalty it would be at the lower end and there is no basis to warrant payment to the applicant.

Non-publication order

[24] The respondent has requested a non-publication order. No evidential basis has been provided for such an order and I decline to make one.

[25] The applications for interest and penalty and non-publication orders are dismissed.

Time payment

[26] The respondent had sought time to pay any wage arrears. I may order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it.¹³ In my view the respondent's financial position warrants an order for payment by instalments. There is evidence in its profit and loss statement and from its accountant detailing its financial constraints.

[27] The respondent is ordered to make payment by instalments of \$400 per month starting within 28 days of the date of the determination pursuant to 131(1A) Employment Relations Act 2000. It is a condition of this order the parties meet annually to review the amounts paid.

Costs

[28] Both parties accept the starting point for costs shall be the Authority's daily notional tariff of \$3,500 per hearing day. This matter took two and a half hearing days.

[29] In reality this matter ought to have been dealt with in one days hearing time. The reason it took three days was because the applicant sought to introduce a new

¹³ Section 131(1A) Employment Relations Act 2000.

issue about unpaid alternative days on the first hearing day resulting in two further days hearing time. There was no basis for any delay in filing that matter. I accept the respondent's argument that the issues have been constantly evolving creating delay and extra cost.

[30] Some issue was made about pre-hearing conduct including the withdrawal of a personal grievance claim. This did not increase the respondent's legal costs.

[31] Accordingly costs shall be limited to one days hearing time or \$3,500.

[32] Insite Security and Investigations Services Limited is ordered to pay \$3,500 to Sandra Watkins as a contribution towards her costs.

T G Tetitaha
Member of the Employment Relations Authority