



order against the respondents to pay annual holiday pay, sick pay and bereavement leave under s.77 of the Holidays Act 2003.

### **Non participation by the respondents**

[2] The respondents have not lodged statements in reply and have not provided any other substantive response to the claims made by the Labour Inspector. Although Ms Beirne did communicate with the Authority's office by email with respect to taking part in a case management telephone conference on 21 January 2015, when the Authority attempted to connect Ms Beirne to the call, using the telephone number that she had supplied for that purpose, Ms Beirne did not answer.

[3] Following the telephone conference at which Ms Baldwin alone took part, the Authority issued directions giving the respondents until 4pm on Friday, 30 January 2015 to serve and lodge their statements in reply, together with any other documentation that they wished to rely upon in responding to Ms Baldwin's claims. It was made clear in the notice of direction that it was the respondents' responsibility to ensure that the documents were received by the Authority and simply asserting that they had been sent was not sufficient.

[4] The deadline of 30 January 2015 expired without any further communication from the respondents. Accordingly, as was signalled in the notice of direction would be the case, the Authority has determined the matter on the basis of the documents that have been received from the Labour Inspector.

### **Brief statement of events**

[5] All of these details derive from the documentation provided by Ms Baldwin. In the absence of any contradictory account from the respondents, I accept the veracity of Ms Baldwin's account.

[6] The respondents operate a homestay and catering business in Greymouth trading as *Chez Beirne Catering & HomeStay*. A former employee, Ms Anderson, was employed by the respondents between 24 July 2011 to 6 December 2013 as a catering assistant. She usually worked approximately 30 hours per week from Monday to Friday.

[7] On 3 March 2014 Ms Anderson contacted the Ministry of Business, Innovation and Employment (MBIE) regarding a claim for arrears of final holiday pay. She notified Ms Baldwin that she had not received any paid annual leave during her employment and that she received \$471 as holiday pay when her employment ended.

[8] On 31 March 2014 Ms Baldwin wrote to the respondents asking for records pursuant to s.229 of the Employment Relations Act 2000 (the Act) relating to the former employee's employment. On 23 April 2014, after Ms Baldwin had chased for a reply, Ms Beirne advised Ms Baldwin by email that she had received the letter dated 31 March 2014 and would action it. On 24 April, 2 and 12 May and 16 June 2014, in the absence of the information having been provided, Ms Baldwin sent chasing emails asking Ms Beirne to provide the information requested.

[9] On 24 June 2014 Ms Baldwin issued an improvement notice, relying on her power under s.223D of the Act, requiring the respondents to provide, by 25 July 2014, time, wage and leave records, together with a copy of any employment agreement for Ms Anderson. A copy of the improvement notice was sent by email to Ms Beirne on 24 June and receipt was acknowledged by return email. In addition, a Bailiff personally served the improvement notice on Mr Beirne on 16 July 2014.

[10] The respondents have not lodged any objection to the improvement notice and have not complied with the improvement notice, according to Ms Baldwin.

[11] On 19 October 2014 Ms Anderson provided Ms Baldwin with details of what she was paid during her employment and the dates on which she says she took leave. Ms Anderson took sick leave, bereavement leave and other leave during her employment but did not receive payment. Ms Baldwin calculated that Ms Anderson was owed the gross sum of \$6,650.83<sup>1</sup> pursuant to the Holidays Act 2003. Ms Baldwin wrote to the respondents giving them until 29 October 2014 to either pay the amount calculated or to respond in writing with an explanation about why they disagreed with Ms Baldwin's calculation. Ms Baldwin asserts that the respondents have not, to her knowledge, either paid or responded to her letter dated 21 October 2014.

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<sup>1</sup> This figure was subsequently amended to \$6,348.42 following a recalculation by Ms Baldwin in response to queries from the Authority.

[12] Ms Baldwin lodged with the Authority copies of correspondence she had had with the respondents, together with a copy of the improvement notice, Ms Anderson's calculations of holiday pay and other pay owed to her and notes from Ms Baldwin's file of conversations she had had with Ms Beirne.

### **The issues**

[13] The following are the issues that need to be determined by the Authority:

- (a) Whether an order should be made for the respondents to pay the gross sum of \$6,348.42 in respect of arrears of sick leave, bereavement leave and annual leave entitlements owed to Ms Anderson;
- (b) Whether a penalty should be imposed upon the respondents for failing to comply with an improvement notice issued under s.223D of the Act; and
- (c) Whether a penalty should be imposed upon the respondents for breaching ss.24, 25 and 62 of the Holidays Act 2003.

### **Should an order be made that the respondents pay the sum of \$6,348.42?**

[14] Ms Baldwin seeks an order that the respondents pay the sum of \$6,348.42 pursuant to s.77 of the Holidays Act 2003. Section 77 provides:

***77 Proceedings by Labour Inspector to recover arrears of pay***

*(1) A Labour Inspector may take proceedings on behalf of an employee to recover unpaid holiday pay or leave pay that the employee is entitled to under this Act.*

*(2) If a Labour Inspector takes proceedings under subsection (1), the Labour Inspector must not issue a demand notice under section 224 of the Employment Relations Act 2000 in respect of the same pay.*

*(3) Section 131 of the Employment Relations Act 2000 applies, with all necessary modifications, to proceedings taken under subsection (1).*

*(4) An action initiated or taken under this Act by a Labour Inspector may be completed by another Labour Inspector.*

[15] Section 131 of the Act provides:

***131 Arrears***

*(1) Where—*

*(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or*

*(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,— the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.*

*(1A) The Authority 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.*

*(2) Subsection (1) applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.*

*(3) Subsection (1) does not affect any other remedies for the recovery of wages or other money payable by an employer to any employee under an employment agreement or a contract of apprenticeship.*

[16] Pursuant to these sections, the Authority has the jurisdiction to determine the proceedings brought by the Labour Inspector on behalf of Ms Anderson.

[17] Ms Baldwin lodged with the Authority a detailed schedule, which I understand was prepared by Ms Anderson, which set out the hours she worked on a weekly basis between 24 July 2011 and 6 December 2013. This schedule also set out the pay received and the leave that she had taken in relation to sickness, bereavement and holidays.

[18] I am satisfied that Ms Baldwin's calculation of the bereavement leave due to Ms Anderson of three days (amounting to \$315 gross) is correct. I also accept Ms Baldwin's calculation that Ms Anderson was entitled to ten days sick leave and that the correct value of that sick leave is \$1,056. However, it would appear from Ms Anderson's table that she was paid in respect of 16 hours of sick leave for the period 9 to 13 April 2012, in the gross sum of \$280. Therefore, this sum should be deducted from the \$1,056 resulting in the sum of \$776 being due.

[19] I also accept Ms Baldwin's assertion that Ms Anderson was entitled to four weeks annual leave for the period of 24 July 2011 to 23 July 2012 and a further four weeks annual leave for the period 24 July 2012 to 23 July 2013. This right derives from s.24 of the Holidays Act, which states:

***24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen***

*(1) Subsection (2) applies if—*

*(a) the employment of an employee comes to an end; and*

*(b) the employee is entitled to annual holidays; and*

*(c) the employee has not taken annual holidays or has taken only some of them.*

*(2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—*

*(a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or*

*(b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.*

[20] I also agree with Ms Baldwin's submission that s24 requires that the whole of these eight weeks of annual leave should be paid at a rate based on the greater of ordinary weekly pay or average weekly earnings as if the annual leave was being taken at the end of her employment.

[21] Average weekly earnings are defined in the Holidays Act as 1/52 of an employee's gross earnings. Ms Anderson's gross earnings during the last 12 months of her employment amounted to \$28,997.25, which results in average weekly earnings of \$557.64. This sum multiplied by eight, results in the gross sum of \$4,461.12.

[22] Section 25 deals with the calculation of annual holiday pay if employment ends before further entitlement has arisen. This provides that:

***25 Calculation of annual holiday pay if employment ends before further entitlement has arisen***

*(1) Subsection (2) applies if—*

*(a) the employment of an employee comes to an end; and*

*(b) the employee is not entitled to annual holidays for a second or subsequent 12-month period of employment because the employee has not worked for the whole of the second or subsequent 12 months for the purposes of section 16.*

*(2) An employer must pay the employee 8% of the employee's gross earnings since the employee last became entitled to the annual holidays, less any amount—*

*(a) paid to the employee for annual holidays taken in advance; or*

*(b) paid in accordance with section 28.*

[23] In order to calculate the sum due under s25, one must calculate Ms Anderson's gross earnings from 24 July 2013 (her anniversary date) to the end of her employment. This amounts to \$10,289.25. One must then add to this sum

- a. unpaid sick leave in the sum of \$776;
- b. unpaid annual holiday in the sum of \$4,461.12; and

c. unpaid bereavement leave in the sum of \$315,

which results in a total gross earnings of \$15,841.37. 8% of this sum amounts to \$1,267.31.

[24] Ms Anderson received annual holiday pay at her termination in the gross sum of \$471.

[25] When the sums due are added together and one deducts annual holiday pay already paid, that leaves a total sum owing to Ms Anderson of \$6,348.42. This is the sum that the respondents are to pay to the Labour Inspector pursuant to s.77 of the Holidays Act 2003. I do not order payment by instalments as there is no evidence before the Authority that the financial position of the respondent requires it.

**Should the Authority award interest on the orders for arrears?**

[26] The Labour Inspector seeks interest on the order for arrears. Section 84 of the Holidays Act provides:

***84 Power to award interest on unpaid holiday pay or leave pay***

*(1) Subsection (2) applies if—*

*(a) the Authority gives judgment for an employee in an action to recover holiday pay or leave pay; or*

*(b) the Authority makes a determination under section 226 of the Employment Relations Act 2000 in favour of the employee.*

*(2) The Authority may include, in the sum for which judgment is given or the determination is made, interest for the whole or any part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment or determination.*

*(3) interest included in a judgment or determination must not exceed interest at the rate calculated under clause 11 of Schedule 2 of the Employment Relations Act 2000.*

*(4) This section does not authorise the giving of interest upon interest.*

[27] Clause 11 of Schedule 2 of the Employment Relations Act 2000 provides:

***11 Power to award interest***

*(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause*

*of action arose and the date of payment in accordance with the determination of the Authority.*

*(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.*

*(3) Subclause (1) does not authorise the giving of interest upon interest.*

[28] Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes the rate of 5.0% per year for the purposes of section 87 of the Judicature Act 1908.

[29] The respondents have not explained why they did not pay the correct sums under the Holidays Act. This failure means it is impossible to assess whether there was a good reason for the failure. In the absence of such information, I agree that it is appropriate to include interest on the sum which I have determined is to be paid by the respondents. This interest will be calculated by reference to the sum of \$6,348.42 (or any lesser sum which remains outstanding if part payment of the arrears is made) at the rate of 5% per year, in respect of the period commencing on 6 December 2013 and ending when payment of the arrears has been made in full.

**Should a penalty be imposed upon the respondents pursuant to s.223F of the Act?**

[30] Section 223F of the Act provides:

***223F Penalty***

*(1) An employer who fails to comply with an improvement notice issued under section 223D is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*

*(2) If subsection (1) applies, a Labour Inspector may not also bring an action seeking a penalty in respect of the same matter under any of the relevant Acts.*

[31] The Labour Inspector's power to issue an improvement notice is set out in s.223D of the Act. This provides:

***223D Labour Inspector may issue improvement notice***

*(1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.*

*(2) An improvement notice issued under subsection (1) must state—*

*(a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and*

*(b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and*

*(c) the nature and extent of the employer's failure to comply with the provision; and*

*(d) the steps that the employer could take to comply with the provision; and*

*(e) the date before which the employer must comply with the provision.*

*(3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).*

*(4) An improvement notice may be issued—*

*(a) by giving it to the employer concerned; or*

*(b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.*

*(5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.*

*(6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.*

[32] The improvement notice that was issued to the respondents by the Labour Inspector stated, in part, the following:

*I, Kim Baldwin, being a Labour Inspector appointed under section 223 of the Employment Relations Act 2000 ("the Act") reasonably believe that you are failing, or have failed to comply with the following:*

*Section 229(d) of the Employment Relations Act 2000.*

[33] Unfortunately, there is no such provision in the Act as s.229(d). It is assumed that Ms Baldwin was referring to s.229(1)(d) which states:

...

**229 Powers of Labour Inspectors**

*(1) For the purpose of performing his or her functions and duties under any Act specified in section 223(1), every Labour Inspector has, subject to sections 230 to 233, the following powers:*

...

*(d) the power to require any employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both of any employee of that employer:*

[34] Although the improvement notice apparently had some attachments, being extracts from the Act, it did not include as an attachment s.229(1)(d). Furthermore, under the heading in the improvement notice *Nature and extent of employers' failure to comply:*" the improvement notice again referred to s.229(d) of the Act. It did, however, then go on to state:

*Employment Relations Act 2000 power of Labour Inspector to request the employer to supply to the Labour Inspector a copy of the wages and time record or holiday and leave record or employment agreement or both.*

[35] Again, unfortunately, this précis of s.229(1)(d) is not quite correct in that it refers to the power of the Labour Inspector to **request** the employer to supply wage and time records, whereas s.229(1)(d) of the Act refers to the power of the Labour Inspector to **require** an employer to supply a copy of the wages and time records.

[36] In light of the clear requirement of s.223D(2) of the Act that the improvement notice must state the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed to comply with, I believe that the improvement notice is defective as it fails properly to identify the provision in question. In light of the fact that the improvement notice is a document issued pursuant to a statute, and further given that a failure to comply with it can render an employer liable to a penalty (which could be in a sum up to \$10,000 in the case of these particular respondents), it is essential that an improvement notice complies exactly with the requirements set out in s.223D of the Act.

[37] Unfortunately, this improvement notice did not do so and, although the failing is arguably a technical one, by referring to a provision that does not exist, I find that it does not comply with the requirements of s.223D and so I am unable to impose a penalty pursuant to s.223F.

**Should a penalty be imposed on the respondents pursuant to s.75 of the Holidays Act 2003?**

[38] The relevant parts of section 75 of the Holidays Act provide as follows:

***75 Penalty for non-compliance***

*(1) An employer who fails to comply with any of the provisions listed in subsection (2) is liable,—*

*(a) if the employer is an individual, to a penalty not exceeding \$10,000:*

*.....*

*(2) The provisions are—*

*(a) section 16 and sections 21 to 28 (which relate to an employee's entitlement to, and payment for, annual holidays):*

*.....*

*(d) section 63, section 65, and sections 69 to 72 (which relate to an employee's entitlement to, and payment for, sick leave and bereavement leave):*

[39] Section 76 of the Holidays Act provides as follows:

**76 Proceedings by Labour Inspector for penalty**

*(1) A Labour Inspector is the only person who may bring an action in the Authority against an employer to recover a penalty under section 75.*

*(2) A claim for 2 or more penalties against the same employer may be joined in the same action.*

*(3) A claim for a penalty may be heard in conjunction with any proceedings for the recovery of holiday pay or leave pay.*

*(4) After hearing an action for recovery of a penalty, the Authority may—*

*(a) give judgment for the amount claimed; or*

*(b) give judgment for an amount that is less than the amount claimed; or*

*(c) dismiss the action.*

*(5) An action for the 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, to the Labour Inspector.*

*(6) A penalty that is recovered must be paid,—*

*(a) if, and to the extent, ordered by the Authority, to any person the Authority specifies; or*

*(b) in any other case, into court and then into a Crown Bank Account.*

[40] Section 24 of the Holidays Act deals with the calculation of annual holiday pay if employment ends and entitlement to holidays has arisen. Section 25 deals with the calculation of annual holiday pay if employment ends before further entitlement has arisen. Both of these sections apply in this case because Ms Anderson was not paid holiday pay for the periods 24 July 2011 to 23 July 2013, nor for the remaining period immediately prior to her employment ending. Section 63 of the Holidays Act deals with the entitlement to sick leave and bereavement leave.

[41] There has been no substantive communication from the respondents explaining why they have not made the payments to Ms Anderson required of them under the Holidays Act. However, there appears to have been a history of prevarication and non co-operation in their dealings with the Labour Inspector, from which I infer that the respondents have been trying to hide their failures to pay, and that their failures were deliberate. In such circumstances it is appropriate for penalties to be awarded.

[42] As to the amounts of the penalties, I balance the seriousness of the failings against the absence of any information from the respondents about the circumstances of the failings. The failure to pay holiday pay for the periods 24 July 2011 to 23 July 2012 and 24 July 2012 to 23 July 2013 is a serious breach of the Holidays Act, as it

undermines the whole purpose of Part 2 of that Act. I assess that a penalty in the sum of \$2,500 is appropriate.

[43] The failure to pay final holiday pay as required under s25 of the Holidays Act warrants a penalty of \$500.

[44] The failure to pay sick pay and bereavement pay warrants a further penalty of \$1,000.

[45] Pursuant to s. 76 of the Holidays Act I direct that \$1,000 of the penalty should be paid to Ms Anderson. The remainder is to be paid to the Authority which will pay it into a Crown Bank Account.

### **Orders**

[46] The respondents, on a joint and several liability basis, are to make the following payments:

- a. to the Labour Inspector arrears in the sum of \$6,348.42, together with interest on such sum (or any lesser sum which remains outstanding if part payment of the arrears is made) at the rate of 5% per year, in respect of the period commencing on 6 December 2013 and ending when payment of the arrears has been made in full; and
- b. to the Labour Inspector a penalty in the total sum of \$1,000; and
- c. to the Employment Relations Authority, penalties in the total sum of \$3,000.

[47] The Labour Inspector is to pass on to Ms Anderson all sums received in respect of the orders at paragraph 46(a) and (b) above.

### **Costs**

[48] Ms Baldwin seeks an award of costs against the respondents, together with recovery of the Authority's lodgement fee of \$71.56. I agree that the respondents should reimburse to the Labour Inspector the lodgement fee, and they are ordered to do so accordingly.

[49] However, it is not clear what other recoverable costs have been incurred by the Labour Inspector, and so, if she wishes the respondents to make a contribution towards the Labour Inspectorate's reasonable costs, within 28 days of the date of this determination she is to serve and lodge a memorandum setting out the extent of those costs, and the basis upon which she believes the residents should contribute towards them. The respondents would then have a further 28 days within which to serve and lodge a response.

David Appleton  
Member of the Employment Relations Authority