

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 165
3112292

BETWEEN	JOHANN MASON COILS Applicant
AND	FOTON CENTRAL 2016 LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Derek Manktelow, director of the Respondent
Investigation Meeting:	On the papers
Determination:	27 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Johann Coils applied to the Authority for an order requiring his former employer Foton Central 2016 Ltd (Foton) to pay arrears for annual leave and holiday pay he was not paid at the end of his employment.

[2] Foton's director Derek Manktelow accepted arrears were due to Mr Coils but not as much as he had claimed. Mr Manktelow asked that any order made for payment allow for that to be done by instalments because Foton had lost its business, he had lost his own income and he was in poor health.

[3] Mr Coils said his outstanding annual leave entitlement had been twice the nine days shown on his final payslip. He said Foton had deducted a further nine days which should have been treated as sick leave. Those were days he said he took off to accompany his daughter when she required hospital treatment. Mr Coils also sought

payment of the eight per cent holiday pay due on his earnings for the part-year he worked before his employment ended in November 2019.

The Authority's investigation

[4] The parties were directed to mediation but did not resolve the matter. On its return to the Authority, this matter has been investigated 'on the papers'. Those documents included Mr Coils' statement of problem, copies of his payslips for his employment from 12 February 2018 until 8 November 2019, and email correspondence from Mr Coils and Mr Manktelow to the Authority. The correspondence was in response to requests from the Authority for further information and explanation.

The amount due

[5] Mr Manktelow said Foton had to close its business in November 2019 after losing a distribution franchise. Shortly before the business closed he had Mr Coils and Foton's office manager Dee Long sit down together to work out Mr Coils leave entitlements. During 2018 and 2019 Ms Long had been very ill and Mr Coils' holidays had not been recorded properly. Mr Manktelow said Mr Coils' final payslip reflected what Mr Coils had told Ms Long in November 2019 about what leave he had taken. Sadly Ms Long died in January 2020 so no direct account from her of those discussions was possible.

[6] Mr Manktelow also said a cash payment of \$2,000 had been made to Mr Coils, towards the balance of his holiday pay. Mr Manktelow said that payment was made from his own pocket while Mr Coils said he understood it was made by a shareholder of Foton. On either account, there was an amount of \$2,000 that needed to be deducted from whatever balance was to be the subject of an Authority order.

[7] This was not a situation where, ultimately, s 132 of the Employment Relations Act 2000 (the Act) applied. The section allows for the Authority to accept the evidence of workers if their employer has failed to keep and provide proper pay records. In this case a full set of pay slips from Foton were available to Mr Coils showing his earnings and accrued leave entitlements for the full length of his employment.

[8] On balance Mr Coils had not provided sufficient information to warrant disturbing the annual leave tally of nine days shown his final pay slip. Mr Manktelow's account that this tally resulted from information Mr Coils gave Ms Long was more

compelling. The pay entitlement on that tally was \$2,596.16, before PAYE was deducted.

[9] Similarly, the amount of \$4,592.32 showing as “holiday pay owing” on his final pay slip could be accepted as the amount due from the eight per cent holiday pay entitlement for the part-year worked up to early November. This amount appears slightly higher than what was due from what Mr Coils’ pay slips showed as his year-to-date taxable earnings but that may be due to including some portion running from his slightly earlier employment anniversary date. In any event the evidence did not, overall, support disturbing Ms Long’s calculations.

[10] The result was that Mr Coils had an outstanding annual leave and holiday pay entitlement of \$7,188.48, from which PAYE deductions of \$2,472.11 had to be made. From the resulting balance of \$4,716.37, a further sum of \$2,000 had to be deducted for a cash part-payment of \$2,000 already made to him.

[11] The balance due from Foton for payment to Mr Coils was \$2,716.37. He is entitled to an award of interest on that amount from the date on his final payslip, of 8 November 2019, until payment of the outstanding amount is made.

Order for payment

[12] Accordingly Foton must pay Mr Coils the sum of \$2,716.37 remaining outstanding and due to him as arrears of annual leave and holiday pay. Interest must be paid on that amount for the period from 8 November 2019 to the date of payment. Interest is to be calculated using the Civil Debt Interest Calculator.¹

No order for payment by instalments

[13] Foton’s application for an order allowing payment by instalments is declined. Mr Manktelow provided some information about his personal financial and health difficulties. However, in this case, those personal circumstances were not the measure to be used in considering where payment of arrears by instalments should be ordered. Such orders can be made “only if the financial position of the employer requires it”. In this case the legal entity employing Mr Coils was the company, not Mr Manktelow. There was no verified information about what assets or sources of finance Foton might

¹ www.justice.govt.nz/fines/civil-debt-interest-calculator. See Employment Relations Act 2000 Schedule 2 clause 11(1) and Interest on Monday Claims Act 2016.

have access to for the purpose of satisfying the Authority's order. As such it could not reliably be said that Foton's financial position 'required' an order for payment by instalments. In the event of failure to pay, Mr Coil could seek to have the order enforced through the District Court and its civil debt collection processes.² The Companies Office register show the Registrar has begun steps to remove Foton from the register following failure to lodge an annual return. Mr Coils may need to take steps to halt or reverse that prospect for the purpose of securing payments ordered in this determination.³

[14] No order for payment by instalments is made. Payment of the amount ordered is due by no later than 28 days from the date of this determination.

Reimbursement of filing fee

[15] Within those 28 days Foton must also reimburse Mr Coils \$71.56 for the fee paid to lodge his application in the Authority.

Robin Arthur
Member of the Employment Relations Authority

² Employment Relations Act 2000, s 141(1).

³ Companies Act 1993, s 321 and s 328.