

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 295  
3004138

BETWEEN

ROGER CROSS  
Applicant

AND

D BELL DISTRIBUTORS  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Nikkii Flint, Counsel for the Respondent

Investigation Meeting: 21 September 2017

Oral determination: 21 September 2017

Written record issued: 25 September 2017

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Roger Cross worked as a truck driver for D Bell Distributors Limited from 21 September 2015 to 16 December 2016. He sought orders requiring DBD to pay him for annual leave entitlements accrued during that period.

[2] DBD said it had paid his holiday pay with his wages each fortnight so did not owe him anything more. Section 28 of the Holidays Act 2003 does allow employers, in two specified circumstances, to pay holiday pay to some workers on such a pay-as-you-go basis. However Mr Cross said DBD had not met the requirements that would have allowed DBD to pay his holiday pay that way, so DBD must pay him for annual holiday entitlements.

[3] He also sought orders imposing two penalties on DBD: one for not paying him for the annual leave he had claimed was due to him when he left the job and another one for not providing him with a written employment agreement. DBD insisted it had provided a written agreement and had not breached any Holidays Act requirements.

[4] Arising from his application to the Authority, and DBD's reply to it, the following issues had to be determined:

- (i) Was Mr Cross entitled to be paid for annual holidays at the end of his employment with DBD?
- (ii) If so, what amounts and what orders should be made regarding its payment, including whether any interest should be awarded on any amount found to be owed to Mr Cross?
- (iii) Was DBD liable to penalties:
  - (a) under the Holidays Act 2003, for failure to pay holiday pay when due, and/or
  - (b) under the Employment Relations Act 2000, for failure to provide a written employment agreement?
- (iv) Should either party contribute to the costs of representation of the other party?

### **The Authority's investigation**

[5] Mr Cross and DBD's administration officer Karilyn Ratahi provided oral and written evidence for the Authority's investigation. DBD's counsel and Mr Cross also made oral closing submissions on the issues to be determined.

[6] As permitted by sections 174A and 174E of the Employment Relations Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **An outstanding entitlement to paid annual leave?**

#### *The law*

[7] One circumstance where s 28 of the Holidays Act allows pay-as-you-go arrangements for holiday pay is where the employee is employed under a fixed term agreement for less than 12 months. This did not apply to Mr Cross' employment.

[8] DBD said the other permitted circumstance did. Subsection (1) allows holiday pay to be paid with the employee's regular pay where the employee:<sup>1</sup>

works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual holidays under section 16.

[9] If the nature of Mr Cross' employment met that first condition about the basis of the work, the subsection also required DBD to have met three further conditions:

- (i) he must have agreed to that arrangement in his employment agreement; and
- (ii) his holiday pay must have been paid as "an identifiable component" of his pay; and
- (iii) the holiday pay had to be paid at no less than eight per cent of his gross earnings.

[10] Those conditions set by subsection (1) were conjunctive. They all had to be met. If not, subsection (4) of s 28 set out the consequence:

If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[11] The reference to s 16 concerns the entitlement to four weeks' paid annual holidays after 12 months' continuous employment. Payment "in accordance with this subpart" includes the sections of the Holidays Act that set out how annual leave entitlements should be paid when the employment ends before such entitlements are used: s 24 and s 25.

#### *Failure to meet the conditions of s 28*

[12] The arrangements for Mr Cross's employment did not meet the conditions of s 28 of the Holidays Act in three ways.

#### *(i) The work was not intermittent or irregular*

[13] Ms Ratahi's witness statement said Mr Cross had agreed to his holiday pay being paid with his regular fortnightly pay. She said this arrangement was "due to the

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<sup>1</sup> Holidays Act 2003, s 28(1)(a)(ii).

varied and inconsistent nature of the work Mr Cross was employed to carry out”. She said the “inconsistent hours made it overly difficult to keep a running entitlement in hours or weeks”.

[14] She said DBD’s business of hauling flour from plants to bakeries was dependent on supply and demand so there was “little regularity ... of levels of work or on-going work”.

[15] Those explanations did not match what DBD’s own fortnight pay records and Mr Cross’ weekly timesheets showed of how often he worked and for how long. DBD had provided the Authority with copies of its pay records for Mr Cross from September 2015 to December 2016 and his timesheets from May to December 2016.

[16] Those documents showed Mr Cross typically worked more than 120 hours each fortnight. He typically worked six days a week. He typically worked ten or more hours a day. The exceptions were when he was off sick (which was about three days) and a two-week period when he took approved (but unpaid) leave around the time of his marriage in February 2016. The following table sets out a sample, for a three month period, of what those records show:

Pay Period Ended	Total hours	Days worked each week ex timesheets	
7 July 2016	150.5	6	7
21 July 2016	145.5	5	6
3 August 2016	128.0	5	6
18 August 2016	134.0	6	6
1 September 2016	134.0	6	6
15 September 2016	131.0	6	6
29 September 2016	130.0	6	6

[17] The reality was the work DBD had Mr Cross do did not meet any commonly understood meaning or any special legal definition of being “intermittent” or “irregular”. No ordinary objective observer would say a worker who typically worked six days a week, for ten hours a day during all but two weeks of a 66-week period, was doing intermittent and irregular work. While, like any business, demand from customers could vary, DBD clearly had sufficient orders to provide Mr Cross with steady, continuous work throughout the period he was employed.

*(ii) It was not impracticable for DBD to provide Mr Cross with annual leave*

[18] The regular, continuous pattern of work made it possible for DBD to arrange for drivers to cover for other drivers taking annual leave or to engage relief drivers.

[19] This was illustrated by the arrangement for Mr Cross to take a fortnight's unpaid leave in February 2016.

[20] All DBD was doing, by using a pay-as-you-go approach to holiday pay, was avoiding the financial and logistical requirements borne by other businesses that do have to arrange annual leave for their regularly-employed workers.

*(iii) DBD lacked adequate proof of an agreement to the pay-as-you-go arrangement*

[21] DBD said Mr Cross did have a signed employment agreement that included a term agreeing to the holiday pay arrangement it used. This was because Mr Cross had worked for DBD once before, between July and November 2012. His work in 2015 and 2016 was a second period of employment with DBD.

[22] In July 2012 he had signed a three-page type-written document with the following heading: "D Bell Distributors Ltd (DBD) & Associated Companies Employment Assessment and Agreement Contract". The document was an unusual hybrid. It included questions usually asked on an application form along with passages setting out various terms of employment. One of those terms read: "It is agreed that holiday pay entitlement will be paid fortnightly at 8% of earnings". A further page included the following words under details of the hourly pay rate: "8% paid out as Annual Leave entitlement paid out in full each fortnight in final for all hours worked in that said period".

[23] Mr Cross was not offered and so did not sign a new employment agreement when he started work again for DBD in September 2015. DBD said it did not need one. It relied on the terms in the document he signed in 2012. It said the term about holiday pay written in the 2012 document was sufficient to satisfy the condition set by s 28 of Holidays Act that "the employee agrees in his or her employment agreement".

[24] DBD's argument depended on two propositions – firstly, that no new agreement was needed for a second period of employment and, secondly, that the 2012 document Mr Cross signed was an “employment agreement”.

[25] Giving DBD the benefit of significant doubt on the first proposition, for the moment, its argument struggled to clear the hurdle of the second proposition. The Employment Relations Act describes certain terms that an employment agreement must include. Those requirements, set out in s 65 of the Act, now include a term about agreed hours that was not in the Act when Mr Cross worked for DBD in 2012 and then again in 2015-16. Considering only the essential terms that s 65 required in those two earlier years, DBD's document nevertheless failed on several counts. It did not include a description of the work to be performed. The required work could be inferred from references to the need to keep a log-book and to have a current heavy-vehicle licence but the document gave no clear or direct description of the work as driving. It gave no indication of where Mr Cross was to perform the work. A driver's employment agreement would typically state at least a home base from which trips were to be made. It gave no indication of arrangements relating to the times Mr Cross was to work. It listed all seven days of the week but did not state which days or times he might be required to work. It gave no explanation of the services for resolution of employment relationship problems. Arguably, its terms were also contrary to law. This was because it supposedly allowed for the pay-as-you-go holiday pay arrangement when the basis of the work Mr Cross was employed to do proved to be so regular that such an arrangement was not permitted under s 28 of the Holidays Act.

[26] Accordingly it could not safely be said Mr Cross did have an “employment agreement”, even in 2012, of the type prescribed by s 65 of the Employment Relations Act. What was said about holiday pay in the document he had signed in 2012 was not said in an “employment agreement” of the type contemplated by the relevant condition of s 28 of the Holidays Act.

[27] Even if that conclusion were wrong, I have not accepted a further submission from DBD that Mr Cross' claim for further payment was not made in good faith because he was well aware he was getting holiday pay throughout his employment and, either tacitly or expressly, had agreed to that arrangement. Even if he had agreed, s 6(3) of the Holidays Act prevents such an agreement if it restricts or reduces an employee's rights. The exceptions to annual leave entitlements allowed by s 28 are

limited to two specific categories. A worker outside those categories, as Mr Cross was, could not lawfully agree to surrender minimum entitlements. The Holiday Act entitlements include, for the most part, the rest and recreational benefits of taking annual leave, not just being paid in substitute for it.

*The consequence*

[28] The evidence established DBD had not met the conditions of s 28 that would have allowed it to lawfully pay Mr Cross holiday pay in the way that it had. Subsection (4) therefore automatically operated to entitle him to four weeks' annual leave for the full year he worked. And because his employment ended before he had used that leave, s 24 of the Holidays Act, in turn, entitled him to be paid for those four weeks in his final pay. He had not taken any paid annual leave before then.

[29] Section 25 of the Act also operated to require DBD to pay him a further eight per cent of his gross earnings as holiday pay for the time from his one year anniversary of service through to his last day of employment.

*Is being paid for this annual leave 'double counting' or an overpayment?*

[30] DBD protested that being made to pay for those annual holidays meant it had to pay Mr Cross twice for the same entitlement. In her witness statement Ms Ratahi said DBD believed it had already made full payment to Mr Cross. However, if the Authority disagreed and ordered DBD to pay for the annual leave entitlements as well, she said the company would seek to "claw back" the amounts already paid to Mr Cross. She said the amounts paid in the fortnightly pay would amount to "an overpayment" and the Company would wish to recover it.

[31] DBD has already begun steps to seek orders on that basis. The Authority scheduled its 21 September investigation meeting at a case management conference on 31 July. On 5 September counsel for DBD advised she expected instructions from DBD to raise a claim for "recovery of an overpayment". On 18 September DBD lodged a statement of problem seeking orders for Mr Cross to pay DBD \$8229.66. It said this was the sum paid as holiday pay to him during his 2015-16 employment.

[32] However the issue raised by that statement of problem needed to be resolved by this determination of Mr Cross' present application in any event.

[33] The amounts paid as holiday pay to Mr Cross in his regular fortnightly pay were not an ‘overpayment’ that could be deducted from amounts that s 28(4) of the Holidays Act required the Authority to order be paid to him for annual holidays at the end of his employment. This conclusion is supported by the reasoning given in earlier determinations of the Authority in other cases about this same issue and by commentary given by learned authors in texts about New Zealand employment law.

[34] In *David O’Neill Contracting Limited v Labour Inspector Jon Henning* the Authority held the monetary value of holiday payments made unlawfully during the employment could not later be accounted for as overpayments or deducted from amounts due for leave at the end of the employment.<sup>2</sup> It said any contrary argument would render s 28 of the Holidays Act largely irrelevant and would be clearly inconsistent with the objects of that Act.

[35] *Harding v V & A Keefe*, a later determination, reached the same conclusion.<sup>3</sup> It concerned a truck driver who was found to be neither a fixed term employee nor working intermittently and irregularly. He had, with his agreement, received holiday pay during his employment. However the arrangement did not comply with s 28 because of the regular and on-going nature of his work. The Authority found s 28(4) required “the holiday pay incorrectly paid [to] be repaid in lump sum” to the worker. The result was the worker kept the earlier pay and the employer had to pay the same amount again for annual leave entitlements.

[36] The learned authors of *Brookers Employment Law* agreed with that analysis:<sup>4</sup>

HA28.01 Where a ‘pay as you go’ arrangement fails to meet the requirements of s 28(1), the terms of s 28(4) apply, and any payments made with regular pay are not an “overpayment” subject to set-off by the employer: *David O’Neill Contracting Ltd v Labour Inspector* ...

HA28.05 ‘Double-dipping’ where employer error — subs (4)  
Section 28(4) clearly states that an employer who incorrectly pays holiday pay with an employee’s regular pay may be required to make **further** holiday payments to the employee, despite the earlier payment. ...

[37] The learned authors of *Mazengarbs Employment Law* had the same view:<sup>5</sup>

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<sup>2</sup> ERA Christchurch, CA 41/08, 16 April 2008 (Member Cheyne) at [21].

<sup>3</sup> ERA Christchurch, CA 48A/08, 10 October 2008 (Member Crichton).

<sup>4</sup> Online edition, Westlaw Thompson Reuters.

<sup>5</sup> Online edition, Lexis Nexis.

### [3228.2] Summary

... Where an employer has paid holiday pay in circumstances not permitted by the section and the employee's employment continues for 12 months or more, the employee becomes entitled to annual holidays and holiday pay in accordance with the Act, despite the earlier payments.

### [3228.4] Payment under the current Act

... Subsection (4) was also inserted at Select Committee stage to clarify that where the employer has incorrectly paid holiday pay on a pay-as-you-go basis, the employee is entitled to [be] paid annual holidays in accordance with the Act with **no set-off for payments already made.** (*bold emphasis added*)

...  
The Authority in *David O'Neill Contracting Ltd v Labour Inspector* ... rejected in very quick order a submission that payments made with regular pay, but not in compliance with subs (1) criteria, could be recovered under the provisions of the employment agreement as an overpayment of wages and so deducted from holiday pay due at the end of employment. To allow such a set-off would render ss 27 and 28 as "largely irrelevant" it held.

[38] The consequence for an errant employer, of effectively having to pay holiday pay twice, may seem harsh. DBD submitted the Holidays Act could not intend to entitle a worker to "a double dip". Section 28(4) is however, clearly, a deliberate instrument of parliamentary intention to provide regularly and continuously-employed workers with annual holidays so they have real opportunities for rest and recreation.<sup>6</sup> Subsection (4) intentionally creates a significant financial disincentive to the use of pay-as-you-go provisions outside the two strictly limited categories of employee allowed by s 28. An employer who does not strictly comply with the conditions for use of s 28 does so at its own, costly, peril.

### Order

[39] For the reasons given in this determination DBD must pay Mr Cross for his annual leave entitlements as they stood on the last day of his employment in December 2016.

[40] He was paid \$102,870.76 gross in wages for hours worked between 21 September 2015 and 16 December 2016. The calculation of entitlements under s 24 and s 25 of the Act would result in the monetary equivalent of eight per of that gross figure, that is \$8,229.66. This is the further amount that DBD must pay Mr Cross due to the operation of s 28(4) of the Holidays Act.

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<sup>6</sup> Holidays Act 2003, s 3(a).

[41] He is also entitled to interest on that amount from 17 December 2016 until the day it is paid to him, at the current applicable rate of 5 per cent.<sup>7</sup>

[42] DBD is ordered to pay that amount, with interest, by no later than 28 days after the date that the written record of this determination is issued.

### **Penalties**

[43] Mr Cross' claim for a penalty under s 65(4) of the Employment Relations Act 2000 had to fail on a technical point. As noted earlier the supposed employment agreement he had signed in 2012 did not meet the Act's requirements about terms that must be included. He should have received a written employment agreement with all the right terms in it before he started working for DBD again in September 2015. However a claim for a penalty must start within 12 months of the reason for the penalty reasonably becoming known to the person claiming it.<sup>8</sup> Although somewhat artificial, Mr Cross has to be deemed to know what the Employment Relations Act said about what his employment agreement should contain. For Mr Cross that meant he would have needed to have begun his penalty action on this point before 22 September 2016. His application to the Authority was not lodged until March 2017. He was out of time for a penalty to be awarded on those grounds.

[44] Under s 75 of the Holidays Act DBD was liable to a penalty of up to \$10,000 for its breach of s 28 (which resulted in its subsequent failure to pay amounts due under s 24 and s 25 when its employment of Mr Cross ended).

[45] Ms Ratahi's evidence was that DBD had not intended to breach the holiday pay legislation and any error was inadvertent. She said payment of holiday pay in the way made was an honest mistake. The evidence however, overwhelmingly, demonstrated that the volume and regularity of Mr Cross' work never came close to meeting the provision in s 28 meant only to apply to truly casual workers. Even if the intention at the start of his employment in 2015 was to provide him only with intermittent work, as Ms Ratahi said it was, the reality was that the work he did was regular and steady throughout. The section refers to the basis that the employee

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<sup>7</sup> Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4

<sup>8</sup> Section 135(5).

“works for the employer”. It is a continuous concept. It is not limited to what might have been the situation or the intention at the outset. If the basis of the work changes, the use of the pay-as-you-go exception may need to as well.

[46] Ignorance of the limited application of s 28 was not a sufficient defence. DBD had to be deemed to know the law. It was a responsibility of any company in business that employs people, just as such a company like DBD must be deemed to know and be accountable to the tax laws and land transport regulations.

[47] Treating DBD’s arrangement with Mr Cross as a single breach of s 28, the starting point for assessing the amount of a penalty was a maximum of \$10,000. The factors for setting an amount within that maximum have been codified in s 133A of the Employment Relations Act.

[48] Regarding the objects of the Employment Relations Act the actions giving rise to a penalty illustrate the inherent inequality of power in employment relationships. The breach deprived Mr Cross of a minimum statutory entitlement to annual leave after 12 months in his employment. It did not happen accidentally but as the result of DBD’s deliberate business practice. The harm caused to Mr Cross has partly been addressed by the orders made for payment of entitlements. He was however deprived of the opportunity for rest and recreation by not receiving paid annual leave during his employment. The on-going harm was that, according to Ms Ratahi’s evidence, DBD continued to use the same arrangement of pay-as-you-go holiday pay with its current complement of eight or so drivers, most of whom worked full-time hours. DBD said it would contemplate changing that practice if the Authority’s determination did not go its way. Simply reviewing its practice in light of an unfavourable determination lacked strength as a mitigation factor. There was no evidence DBD had been subject to proceedings of a similar nature so that was not an aggravating factor.

[49] Contrary to DBD’s closing submissions deterrence was a factor that favoured imposition of a penalty. DBD itself had continued a practice for many years that was in breach of the Act. A penalty was necessary to deter other employers from doing the same thing.

[50] Failing to meet the statutory obligation to provide the opportunity for rest and recreation was a severe breach of an important social protection. Because what was

before the Authority related to the circumstances of Mr Cross only, the level of penalty could be provisionally adjusted to 30 per cent of the maximum. There was no evidence DBD lacked the means to pay a penalty at that level. As a matter of proportionality, both in the circumstances of this case and compared with other cases, the amount of \$3000 was modest.

[51] As the wrong done to Mr Cross was also addressed by the orders made about his leave entitlements, there was no strong reason for some of the penalty to be paid to him. Instead DBD must pay the penalty of \$3000 for breach of s 28 of the Holidays Act to the Authority for transfer to the Crown account. The penalty must be paid within 28 days of the date of issue of this determination.

### **Costs**

[52] Costs are reserved with parties encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is required, Mr Cross should lodge and serve a memorandum on costs within 28 days of the date the written record of this determination was issued. DBD would then have 14 days from the date of service to lodge a reply memorandum.

[53] Costs, which are a contribution to reasonably incurred costs of representation, are typically awarded on the basis of a notional daily tariff.<sup>9</sup> In this case Mr Cross had some limited assistance from an advocate in lodging his claim in the Authority but represented himself at the investigation meeting. He is therefore not entitled to costs for the meeting but he may have incurred some for earlier advice and assistance. If so, and he seeks a contribution to those costs, any costs memorandum from him should attach the invoice and confirm he has or intends to pay it.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>9</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.