

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 68A/07  
5033643

BETWEEN                      CORY MATTHEW DENTON  
Applicant

AND                              GORRIE FUEL (SI) LIMITED  
Respondent

Member of Authority:      Helen Doyle

Representatives:            Hamish Evans/Tonya Smith, Counsel for Applicant  
Don Gorrie for Respondent

Submissions received:      25 July 2007 from Applicant  
7 August 2007 from Respondent

Determination:                23 August 2007

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**DETERMINATION OF THE AUTHORITY  
AS TO COSTS AND APPROPRIATE RATE  
FOR PAYMENT FOR ALTERNATIVE HOLIDAYS**

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[1]      In my determination dated 25 July 2007 I found in favour of the applicant that he had a personal grievance and was owed unpaid wages. I also found that the applicant was entitled to 8 days payment for public holidays worked where there was no alternative holiday taken prior to termination of his employment.

[2]      Section 60 (2)(b)(i) of the Holidays Act 2003 provides in the event that an employee has not taken the alternative holiday before the date on which employment ends, payment for alternative holidays is at the rate of the employee's daily pay for his or her last day of employment.

[3]      I asked the parties in the determination to attempt to reach agreement on the daily rate at which the 8 days should be calculated. I reserved the issue of costs.

[4] The parties were not able to reach agreement on these matters and accordingly the Authority received submissions from Ms Smith on behalf of the applicant and Mr Gorrie on behalf of the respondent.

### **The submissions**

[5] Ms Smith on behalf of the applicant submits that the applicant's actual costs in bringing the proceedings exceeded \$4,000. An order was sought for payment toward the applicant's costs in the sum of \$2,500.

[6] In terms of payment for the alternative holidays, Ms Smith averaged the hours worked for the last 9 days that Mr Denton actually worked at 7.5 hours and said payment should be made at that rate.

[7] Mr Gorrie on behalf of the respondent, submits:

- That the applicant has attempted to increase costs throughout the hearing with his conduct.
- The applicant was advised the respondent was no longer represented but the respondent did not receive any correspondence regarding costs.
- That costs were increased by attempting to bring inadmissible evidence from a person who had previously worked as a mediation support officer.
- That the applicant increased the respondent's costs by failing to file documents on time.
- That it would be appropriate in this case where there is an application to the Employment Court for a de novo hearing that costs are left to be dealt with by the Court.
- If the Authority was not minded to accept that, a minimal award of \$400 to \$800 should be made because the matter was filed out of time, that there was an attempt to bring in additional and inadmissible evidence, and documents were filed late.

- That the wage claim could and should have been dealt with by the Labour Department and the applicant then would have incurred lower costs.
- With respect to the payment for alternative days, Mr Gorrie agrees that the applicant was paid \$10 per hour prior to termination of his employment and that the applicant should be paid the rate prevailing at the time that the holiday would have been allocated.

## **Determination**

### **Payment for alternative holidays**

[8] Section 60 (2)(b)(i) of the Holidays Act 2003 provides that payment for an alternative holiday must be made at the rate of the employee's relevant daily pay for his or her last day of employment.

[9] Relevant daily pay is defined in section 9 (1) of the Holidays Act 2003 for the purposes of calculating payment for an alternative holiday. Relevant daily pay means the amount of pay that the employee would have received had the employee worked on the day concerned.

[10] In this case because of the variable hours that the applicant worked and the inadequate records in relation to alternative holidays it is not possible to calculate the employee's relevant daily rate under subsection (1) of s 9 of the Holidays Act 2003.

[11] If it is not possible to determine the employee's relevant daily rate under subsection (1) then pay must be calculated in accordance with the formula in s 9 (3). The formula is  $a/b$  —  $a$  is the employees gross earning for the 4 calendar weeks before the end of the pay period immediately before the calculation is made and  $b$  is the whole or part days during which the employee earned those earnings. I have set out the 4 calendar weeks before 30 December 2005. 29 December 2005 was the last day that the applicant physically attended at work. He was then on leave and on his return his employment was terminated.

[12] It was agreed that the applicant's hourly rate was \$10.00.

[13] The applicant was paid fortnightly and the working week ended for those purposes on a Sunday.

December 29	\$ 90.00
December 28	\$ 82.50
December 27	\$ 65.00
December 26	\$120.00
December 25	\$ 82.50
December 23	\$ 55.00
December 21	\$ 75.00
December 20	\$ 82.50
December 19	\$ 82.50
December 18	\$ 85.00
December 15	\$ 75.00
December 14	\$ 82.50
December 13	\$ 82.50
December 12	\$ 82.50
December 11	\$ 70.00
December 9	\$ 75.00
December 8	\$ 75.00
December 7	\$ 80.00
December 6	\$ 55.00
December 5	\$ 87.50

Gross earnings \$1585.00

[13] The gross earning should then be divided by 20 days which is the number of days over which the applicant earned the wages set out above. The figure arrived at is \$79.25

[14] On that basis the applicant is entitled to payment for 8 alternative holidays at the rate of relevant daily pay of \$79.25 which is \$634.00.

[15] I order that Gorrie Fuel(SI) Limited pay to Cory Matthew Denton the sum of \$634 gross being payment for 8 alternative holidays for public holidays worked.

## Costs

[16] The Full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* (unreported, 9 December 2005, AC28/05) referred to the majority of costs awards in the Authority falling within the range \$2,000 to \$2,499 for a one day investigation meeting.

[17] The Authority has discretion as to whether costs are awarded and if they are the amount awarded. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs are not to be used as a punishment or to express disapproval of the unsuccessful party's conduct although if that conduct has unnecessarily increased costs then that can be taken into account in making an award. Costs generally follow the event and awards from the Authority are usually modest.

[18] I do not find that the fact there has been a challenge filed by the respondent to the Employment Court a good reason not to proceed to determine costs for the Authority investigation meeting.

[19] I find that there is no good reason in this case not to make an award of costs in favour of the successful applicant. I consider the applicants actual costs to be reasonable for a personal grievance and recovery matters.

[20] The meeting took approximately 3½ hours.

[21] I accept that there was a delay by the applicant in lodging and serving the statements of evidence which resulted in a telephone conference to arrange a new date for an investigation meeting. There was an objection to the admissibility of one witness's evidence. It was agreed that the evidence would be put to one side until after the investigation meeting. As it turned out I was not of the view that I needed to hear from the witness and that matter could not be said to have contributed to a significant increase in the costs.

[22] Both parties were helpful at the investigation meeting and I did not find conduct during that meeting that unnecessarily increased the time to investigate the matter.

[23] I accept Mr Gorrie's submission that had the Holiday Act issue been the only matter between the parties then it would indeed have been sensible to have it dealt with by a Labour Inspector. This was a situation, however, where the applicant also had a personal grievance that he was unjustifiably dismissed. I am not persuaded that in those circumstances that it would have impacted greatly on costs had the alternative holiday matter been dealt with elsewhere.

[24] Although cost awards are generally modest in the Authority the sum proposed by Mr Gorrie for costs would not in my view sufficiently or reasonably compensate the applicant for the costs he incurred in bringing his claim for which he has been successful. I am of the view that a suitable starting point for an award of costs for a meeting of this nature is \$2,000 as this matter was able to be dealt with in less than a full day.

[25] There does need to be some adjustment for the delay in lodging the briefs because there was a need for a telephone conference and new date to be set. I consider a fair and reasonable award of costs in these circumstances would be the sum of \$1,800.

[26] I order Gorrie Fuel (SI) Limited to pay to Cory Matthew Denton the sum of \$1,800 being costs.

**Helen Doyle**  
**Member of the Employment Relations Authority**