

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 141  
3241139

BETWEEN MARK FODEN  
Applicant

AND SMARTLIFE WHANGAREI  
LIMITED  
Respondent

Member of Authority: Jeremy Lynch

Representatives: Applicant in person  
Gavin Allan for the Respondent

Investigation Meeting: 1 November 2023 in Whangarei

Submissions and other material received: At the investigation meeting and on 8, 24 November 2023, 13, 14 February 2024, and 5 March 2024 from the Applicant  
At the investigation meeting and on 3 November 2023, 13 February 2024, and 3, 5 March 2024 from the Respondent

Determination: 8 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mark Foden was employed by Smartlife Whangarei Limited (Smartlife) in September 2021 as a technician and salesperson. He claims he was unjustifiably dismissed. In addition, he claims he is owed arrears of wages, holiday pay and KiwiSaver entitlements arising from Smartlife not providing him with the hours of work under his employment agreement. He also claims Smartlife has breached its obligations of good faith.

[2] Smartlife denies Mr Foden was unjustifiably dismissed, and says that by January 2022 the parties' employment relationship had become casual in nature. It does

not accept that any arrears are owed, and says it has not breached its obligations of good faith.

### **The Authority's Investigation**

[3] For the Authority's investigation, written witness statements were lodged by Mr Foden and his wife Emma Foden. As recorded in the directions of the Authority issued to the parties on 7 September 2023, Smartlife's director Grant Allan was given the opportunity to lodge a witness statement, however he chose not to provide one. Mr Allan gave extensive oral evidence for Smartlife at the investigation meeting.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the 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.

### **The Issues**

[5] The issues requiring an investigation and determination are:

- (a) Whether Mr Foden was unjustifiably dismissed by Smartlife, and if so, what remedies (if any) should he receive?
- (b) Is Mr Foden owed arrears of wages, arising from the alleged failure by Smartlife to provide Mr Foden with the hours of work provided for under the employment agreement?
- (c) Has Smartlife breached the provisions of s 4 of the Act?
- (d) If Smartlife has breached s 4 of the Act in respect of its obligations of good faith, should it be required to pay a penalty?
- (e) Should any remedy awarded be reduced (under s 124 of the Act) for blameworthy conduct by Mr Foden which contributed to the circumstances which gave rise to his grievance?
- (f) Should either party be required to contribute to the representation of the other party?

### **Background**

[6] Smartlife supplies and installs 'smart' systems for managing lighting, heating and security in both domestic and commercial settings.

[7] Mr Foden commenced his employment with Smartlife on 20 September 2021. The terms of his employment were recorded in a written employment agreement. Under the employment agreement, Mr Foden was paid an hourly wage of \$38.462, and the employment was on a full-time and ongoing basis.

[8] Smartlife is a small business. Until Mr Foden's employment, Smartlife's workforce comprised solely its director, Mr Allan.

[9] Mr Foden's evidence (unchallenged by Smartlife) is that within a matter of weeks of the commencement of his employment, there were issues with him not receiving his wages on time, or not receiving the correct amount of wages.

[10] It was accepted by both parties that part of the reason for Smartlife's difficulties in paying Mr Foden on time was that the company simply did not have enough work to keep Mr Foden occupied full time.

[11] The parties met on 26 November 2021 to discuss Mr Foden's pay issues.

[12] For Smartlife, Mr Allan's evidence is that issues around lack of workflow were "teething problems" not uncommon with new businesses. He says that he had had a "carrot dangled in front of me from Head Office", meaning that he understood from Smartlife's franchisor that a significant volume of new work would be available in 2022.

[13] Mr Foden says that his employment with Smartlife was "premature". He accepts that Smartlife should not have employed him when it did, and for his own part, he says he would have preferred to have a period of time off prior to commencing his role with Smartlife, so that he could carry out some renovation work at home.

[14] He says he proposed to Smartlife that he be placed on a period of leave without pay (LWOP) immediately following the 26 November 2021 meeting, so that he could remodel his bathroom and complete some other work around his house.

[15] The LWOP arrangement was purely oral. It was not recorded in writing. Both parties accept that a LWOP arrangement was entered into in November 2021, and both parties accept that the arrangement was to be discussed again in January 2022.

[16] Under the LWOP arrangement, Mr Foden was to retain full use of his company laptop, mobile phone and vehicle.

[17] The parties met on 10 January 2022. Mr Foden's evidence is that at this meeting it was agreed that his period of LWOP had ended, and he was to resume work on a full time basis.

[18] Smartlife says that at the time this meeting occurred, the business still did not have enough work for Mr Foden to return full-time, so the parties agreed that the LWOP arrangement would continue. Mr Allan says he had "no date in mind" as to when the LWOP arrangement would end. He concedes it was a "mistake" that he did not record any of this in writing, but says that he considered the relationship with Mr Foden was working well so there was no need to formalise the arrangement.

[19] Mr Foden worked (and was paid) on two non-consecutive periods in September 2022, and one period in October 2022. Both parties accept that other than these brief periods, Mr Foden was not provided with any work by Smartlife.

[20] Mr Foden says he "...made constant inquiries to Mr Allan about his return to full-time work". He says of Mr Allan's response:

Gavin's response was always the same. He said that big projects were "in the pipeline" and it should be "any day now" for the work to come through. All I had to do was be patient and wait a little longer.

[21] Mr Foden says that by the beginning of 2023 his frustration at not being provided with full time work had increased. He met with Mr Allan on 13 January 2023, and set out his concerns about not being given full time hours. No solution was discussed or agreed upon at this meeting.

[22] Mr Foden again raised his concerns with Mr Allan on 23 February 2023. His evidence is that he told Mr Allan that he had taken professional advice about his employment situation, and on the basis of this advice, Smartlife owed him wage arrears from January 2022.

[23] The parties met on 6 March 2023 to discuss Mr Foden's concerns. With Mr Allan's consent, Mr Foden made an audio recording of the discussion, a transcript of which was provided to the Authority.

[24] In the discussion, Mr Allan advises that Smartlife's position is that "... I cannot give you full time employment going forwards as of today it's just ... it's just not there ...". Mr Foden then sets out his claim for wage arrears comprising 40 hours per week at the agreed hourly rate, from the date of the parties' meeting in January 2022.

[25] Mr Allan responded “I will do further research around that ... my understanding was that you were on unpaid leave and you would come and work when need be ...”

[26] For Smartlife, Mr Allan says that he did not agree in January 2022 that Mr Foden’s period of LWOP had concluded and that he had resumed full-time hours.

[27] On 14 March 2023 Smartlife wrote to Mr Foden. In this letter, Smartlife set out that it had taken advice, and that:

Nothing has changed since the end of 2021.

...

My advice is that you and I agreed to [LWOP] and there has been no subsequent agreement to change that arrangement. I wish the business was in a position to invite you back.

...

The reality is I should have proposed your position be made redundant, but I have always been hopeful that the economic climate would improve. As I don’t see any immediate improvement, its time to have a discussion about your position with the business.

[28] The letter also sets out an interpretation of s 16(2)(vi) of the Holidays Act 2003 (Holidays Act) which appears to confuse Mr Foden’s entitlement to a period of four weeks’ time off work upon completing 12 months’ continuous employment, with the issue of how the payment for such leave should be calculated, and is plainly wrong.

[29] On 5 April 2023 Mr Foden submitted a claim for arrears of wages in the sum of \$105,337.91.

[30] On 17 April 2023, Smartlife’s HR advisor responded to Mr Foden’s wage arrears claim, disputing that any arrears were owed. This email sets out:

It is the company’s position that the conduct of the parties in this employment relationship changed from a permanent position to one of a casual nature following the period of leave without pay.

[31] Presumably it was the same HR advisor who had advised Mr Allan as to the contents of his 14 March 2023 letter to Mr Foden. As noted above, in that letter, Mr Allan’s position was that there had been no change to the LWOP arrangement.

[32] Mr Foden cannot be simultaneously on a period of LWOP from his permanent ongoing role with Smartlife, as well as employed on a casual basis. The 17 April email from the HR advisor does not address this significant inconsistency in Smartlife’s

opposing positions, and no explanation is provided as to how Mr Foden can be both a permanent and casual employee.

[33] The email goes on to state that as the parties' relationship had changed (to casual employment), it was appropriate that Mr Foden return Smartlife's "assets" (that is the mobile phone, laptop, and vehicle).

### **Was Mr Foden a casual or permanent employee?**

[34] Smartlife's email to Mr Foden (via its HR advisor) of 17 April 2023 advises that the parties' employment relationship had become casual in January 2022, following the end of the agreed period of LWOP.

[35] The Employment Court in *Jinkinson v Oceana Gold (NZ) Ltd* considered the factors relevant to determining whether the real nature of employment is casual or permanent.<sup>1</sup> One of the factors to be considered is whether there is a mutual expectation of continuity.

[36] It would be unusual for a genuinely casual employee to have been provided with a company laptop, cell phone and vehicle in 2021, and enjoy full use of these until May 2023. The provision of these things is more consistent with that of a permanent employment relationship, rather than casual employment, as it suggests that the parties had a mutual expectation of continuity.

[37] Mr Foden's evidence was that he had never agreed to casual employment.

[38] This position was mirrored by that of Mr Allan. In response to questions from the Authority, Mr Allan sought to distance himself from the advice set out in the 17 April email from Smartlife's HR advisor. Mr Allan's evidence was that he did not consider Mr Foden was employed on a casual basis, and that his HR advisor was wrong on this issue. Mr Allan's evidence was that when the parties met in January 2022 to discuss working arrangements, Mr Foden's period of LWOP was extended indefinitely.

[39] This is consistent with the advice in his letter to Mr Foden of 14 March 2023, that there had been no change to the LWOP agreement.

[40] The Authority accepts the evidence of Mr Foden on this point.

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<sup>1</sup> *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 255.

[41] The nature of employment relationships can change over time. It is therefore necessary for the Authority to assess the nature of the relationship as it was at the appropriate time.<sup>2</sup>

[42] There is no evidence that the parties' employment relationship became casual in January 2022, or had become casual by the time of the notification of Mr Foden's termination in May 2023. The parties had a clear mutual expectation of continuity. A finding is made that the parties' employment relationship had not become casual in nature in January 2022, and did not become casual in nature at any point after that.

### **The parties' employment relationship after the January 2022 meeting**

[43] Both parties accept that there was insufficient new work in to keep Mr Foden occupied full time. Mr Foden says "I met with Gavin on 10 January 2022. At this meeting we made work plans for the year ahead." However, other than a discussion about Mr Foden attending a training course later that month, there is no evidence of any plans being finalised. Nor is there evidence that anything significant had changed in respect of Smartlife's predicted workflow.

[44] Mr Foden says he made "constant enquiries to Mr Allan about his return to full-time work." However, there is no evidence of this. Mr Foden provided a complete history of the text messages exchanged between him and Mr Allan. Between the January 2022 meeting and the end of Mr Foden's employment in May 2023, there is only one message in which Mr Foden raises the subject of full-time work. On 5 February 2023 (more than a year since the January 2022 meeting) Mr Foden sent Mr Allan a text message saying:

It would be nice to get a few more jobs in and be back on full time. Things have been a bit tough over this past year and I/we need to start moving forward.

[45] This is not evidence that the parties had ended the LWOP arrangement, nor is it evidence that Mr Foden was constantly enquiring about his return to full-time work.

[46] Given there was insufficient work for Mr Foden in 2021, it would be unlikely that Smartlife would agree to place Mr Foden back on the payroll on a full-time basis, yet not require him to perform any work.

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<sup>2</sup> *Savage v Capital & Coast District Health Board* [2016] NZEmpC 83 at [28].

[47] This is consistent with Mr Foden's 5 February 2023 text message, which clearly suggests that Mr Foden's understanding was that there was no agreement that he was back to full-time hours.

[48] In addition, Mr Foden's evidence is that although he raised with Mr Allan his concerns about not being provided with full time work, that:

Gavin's response was always the same. He said that big projects were "in the pipeline" and it should be "any day now" for work to come through. All I had to do was be patient and wait a bit longer.

[49] The Authority finds that this is more consistent with the LWOP arrangement being extended and is not indicative of Mr Foden being placed back on full time duties.

[50] In response to questions from the Authority, Mr Foden said he felt that Mr Allan was "dangling a carrot by saying that work was always just around the corner ... and that there was lots of work about to come in." 'Dangling a carrot' (as Mr Foden describes it) is not the same as confirming the LWOP arrangement had ended, and his permanent full-time role had resumed.

[51] There is no evidence that at the January 2022 meeting, both parties agreed that Mr Foden was to return to fulltime duties (and therefore to full-time pay). The Authority finds that it is more likely than not that the LWOP arrangement was extended, with no definite end point agreed. It was extended on an indefinite basis.

### **Claim for arrears of wages**

[52] As noted above, on 5 April 2023 Mr Foden notified Smartlife that he was seeking wage arrears in the sum of \$105,337.91 (plus holiday pay and KiwiSaver entitlements on this sum).

[53] Mr Foden said the arrears had arisen because at the January 2022 meeting, he and Mr Allan agreed that the LWOP arrangement had ended. Mr Foden says he was therefore entitled to receive the full weekly wages provided for under his employment agreement from January 2022 until the end of his employment in May 2023.

[54] As the Authority has found above, no changes were made to the LWOP arrangement at the January 2022 meeting. Therefore, at the time Mr Foden's employment ended, the LWOP arrangement was still in operation. As such, Mr Foden's claim for arrears of wages (and associated entitlements) cannot succeed.

## **Mr Foden's dismissal**

[55] On 22 May 2023 Mr Allan wrote to Mr Foden's advocate saying:

Our position is that Mark Foden is no longer employed by Smartlife Whangarei and has not been since the 2 months (or thereabouts) of Leave without Pay in January 2022 except for a few casual engagements.

[56] This clearly came as a surprise to Mr Foden, whose advocate wrote to Smartlife on 24 May 2023 "It has come out of the blue... but our client accepts it as notice of the termination of his employment." This email also outlined Mr Foden's personal grievance for unjustified dismissal.

[57] As already noted above, the Authority has found that this was not a casual employment relationship. At the time of his dismissal, Mr Foden was a permanent employee of Smartlife.

[58] By letter dated 21 June 2023 Mr Foden reiterated his personal grievance (in a more detailed form), and raised his claim that Smartlife had breached its obligations of good faith.

### **Was Mr Foden's personal grievance out of time?**

[59] On 23 June 2023 Smartlife's HR advisor wrote to Mr Foden's advocate, advising that as Mr Foden's employment had ended in January 2022, "Smartlife's position is that your notification of a personal grievance is well out of time, and we don't agree to waive the 90 day rule".

[60] An employee must raise their personal grievance with their employer within 90 days of the date of the event giving rise to the grievance, or within 90 days of the action alleged to amount to a personal grievance coming to the notice of the employee.<sup>3</sup>

[61] Mr Foden's evidence was that the notification of his termination contained in Mr Allan's 22 May 2023 email was the first (and only) time Mr Foden had been made aware his employment had been terminated. The Authority accepts this.

[62] It is not clear why Smartlife's HR advisor was of the view that Mr Foden's employment relationship with Smartlife had ended in January 2022. Mr Foden retained

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<sup>3</sup> Employment Relations act 2000, s 114(1).

the use of his work phone, laptop and vehicle, and the parties were in constant contact about work matter by text message.

[63] As the Authority has found, Mr Foden remained a permanent employee of Smartlife, on a period of LWOP. It follows, that for an employee to be on LWOP, there must be an extant employment relationship. An employee cannot be on LWOP if the employment relationship has ended. For Mr Foden to be on LWOP, there must be an ongoing employment relationship.

[64] Mr Foden's personal grievance was raised as soon as he received Smartlife's advice that his employment had been terminated. The grievance was raised on 24 May 2023, and reiterated on 21 June 2023. Mr Foden's grievance was therefore raised within 90 days of being notified of his dismissal. It is not out of time.

### **Dismissal**

[65] A dismissal is the termination of the employment relationship at the employer's initiative.<sup>4</sup> A dismissal does not require an employer to tell an employee that they are dismissed, or write to an employee terminating their employment in order for there to have been a dismissal. A dismissal in law will occur when there has been a 'sending away' of an employee by an employer. In sending away the employer, the employment relationship is brought to an end at the employer's initiative.

[66] For a dismissal to occur there must be a 'sending away' by the employer. Smartlife's email of 22 May 2023 amounts to a dismissal. In this email, Smartlife requires Mr Foden to return all company property including the mobile phone, laptop vehicle and documents.

[67] Prior to this, there had been no sending away commensurate with a dismissal. Mr Foden retained use of company phone, laptop and vehicle, had been given limited paid work on three occasions, and the parties were in regular contact about ongoing work.

[68] In response to questions from the Authority, Mr Allan explained that although the 22 May 2023 email came from his email address, it had in fact been written by Smartlife's HR advisor. Mr Allan said he did not agree with the contents of the email

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<sup>4</sup> *Wellington, Taranaki & Marlborough Clerical Etc. IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95(AC).

at the time, but accepts it was sent, and in cross examination he accepted it amounted to a dismissal.

[69] A finding is made that Mr Foden was dismissed from his employment by Mr Allan's 22 May 2023 email. No notice was given, nor wages paid in lieu of notice. Mr Foden was summarily dismissed.

### **Was Mr Foden's dismissal justified?**

[70] When the Authority considers justification for the actions of Smartlife, including the decision to dismiss, it does so by applying the test of justification in s 103A of the Act.

[71] In determining justification for a dismissal, the Authority considers whether Smartlife's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.<sup>5</sup>

[72] The Authority must also consider whether Smartlife's process in carrying out the decision to terminate Mr Foden's employment was fairly conducted.

[73] Smartlife, as a fair and reasonable employer, could also be expected to comply with the good faith obligations set out in s 4(1A)(c) of the Act, and in particular the obligation to provide access to information relevant to the continuation of an employee's employment, and an opportunity to comment on the information.

[74] Had Smartlife consulted with Mr Foden, it may well have been able to establish a genuine business reason to disestablish his position. However, the Authority observes that the process Smartlife adopted in effecting Mr Foden's dismissal was inadequate and lacking in transparency.

[75] In response to questions from the Authority, Mr Allan accepted that Smartlife did not make any kind of proposal to Mr Foden about the termination of his employment, nor engage in consultation prior to his dismissal. Mr Allan accepted that Smartlife did not follow any process in terminating Mr Foden's employment.

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<sup>5</sup> Section 103A(2).

[76] Procedural effects do not render a dismissal unjustifiable if they are minor, and do not result in the employee being treated unfairly.<sup>6</sup> In this case the flaws in the procedure adopted by Smartlife were more than minor and did result in Mr Foden being treated unfairly.

[77] In all the circumstances at the relevant time, the decision to dismiss Mr Foden was not a decision a fair and reasonable employer could have taken. A finding is made that Mr Foden was unjustifiably dismissed by Smartlife by its email to Mr Foden of 22 May 2023.

**What remedies (if any) should Mr Foden receive?**

[78] Mr Foden has established a personal grievance for unjustified dismissal. He is therefore entitled to a consideration of the remedies sought.

*Lost wages*

[79] Upon establishing a personal grievance for unjustified dismissal, an employee is entitled to a consideration for the reimbursement of remuneration he or she would otherwise have received but for the unjustified dismissal.

[80] Despite the claim in his statement of problem for lost wages under s 123(1)(b) of the Act, at the investigation meeting, Mr Foden confirmed that he was not seeking the reimbursement of wages lost as a result of his unjustified dismissal, he was only seeking wage arrears.

[81] Had a claim for lost wages had been advanced, it is likely no order under s 128 would have been made. As noted above, at the time of Mr Foden's dismissal he was on LWOP. On the face of it he has not lost any wages as a result of his dismissal.

*Compensation for humiliation, loss of dignity and injury to feelings*

[82] Mr Foden's evidence is that his dismissal had a huge impact on him and his family. He gave evidence of the financial implications of being dismissed, and that he felt "foolish and ashamed for trusting and believing in [Mr Allan] every time he told me that work would be coming any day now. I feel completely misled..."

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<sup>6</sup> Section 103A(5).

[83] Mr Foden says that his dismissal caused a huge strain on his marriage and that he was fearful he would lose everything. As a result of his dismissal, Mr Foden says he was stressed, worried, had difficulty sleeping, and could not enjoy life. He says he did not want to be around people, and that he struggled to talk to his wife about his situation. He said his dismissal “really cut deep”, and that he “... felt really stupid and it is difficult to talk and to trust people now. It has really affected my confidence and has impacted on my close relationships.”

[84] Mr Foden’s evidence establishes that he has experienced harm under each of the heads in s 123(1)(c)(i) of the Act. The Authority has quantified the harm suffered having regard to the spectrum of harm, and quantum of compensation, having regard to other awards of compensation.

[85] In *Wikaira v Chief Executive of the Department of Corrections*, the Employment Court confirmed that it was desirable that awards of compensation pursuant to s 123(1)(c)(i) of the Act “... should be, although not over-generous, nevertheless fair, realistic and not miserly”.<sup>7</sup>

[86] Having regard to the particular circumstances of this case, an award of \$16,000.00 under s 123(1)(c)(i) of the Act is appropriate to compensate Mr Foden for the humiliation, loss of dignity and injury to feelings he experienced as a result of his unjustified dismissal.

#### *Contribution*

[87] Where the Authority determines an employee has a personal grievance, it is required under s 124 of the Act to consider the extent to which the employee’s actions contributed towards the situation that gave rise to the personal grievance and if the actions so require, reduce the remedies that would otherwise have been awarded.

[88] No deduction from remedies awarded is to be made under s 124 of the Act. The unjustifiability of Mr Foden’s dismissal from his employment has been established in Smartlife’s failure to follow statutory requirements. These obligations were not Mr Foden’s and there is to be no deduction from the monetary remedies for reason of contribution.

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<sup>7</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237].

### *Contractual notice*

[89] Under the employment agreement, Mr Foden was entitled to four weeks' notice of his dismissal.

[90] There is no dispute that no notice was given, nor wages paid in lieu.

[91] There is no evidence to suggest that the parties entered into an oral variation to the notice provisions of the employment agreement. Mr Foden should have received his full four weeks' notice. He is entitled to a payment of \$6,153.92 (gross), being 40 hours per week (at his hourly rate of \$38.462), for four weeks. Smartlife is to ensure appropriate KiwiSaver obligations are met in respect of this sum.

[92] Mr Foden is also entitled to holiday pay of an additional eight per cent on this sum, being \$492.31. Smartlife is to ensure appropriate KiwiSaver obligations are met in respect of this sum.

### *Final pay*

[93] In addition to four weeks' notice, Mr Foden should have been paid out any accrued annual leave. It is not disputed that Smartlife did not pay Mr Foden's final pay.

[94] As noted above, it appears that the advice Smartlife received in relation to Mr Foden's annual leave during his period of LWOP conflated his entitlement to a period of time off work, with the calculation that needs to be performed in order to determine the payment Mr Foden should receive for the time off. Under the Holidays Act, every employee is entitled to four weeks' annual leave each year.<sup>8</sup> The entitlement to a period of four weeks' leave applies to all employees regardless of whether they work part-time or full-time. The question is around what payment the employee should receive for the time off. Sections 21 to 25 of the Holidays Act provide various methods of calculating holiday pay, depending on the circumstances of the employment.

[95] In Mr Foden's situation, he commenced his employment on 20 September 2021. Ordinarily he would have an entitlement to annual leave (that is an entitlement to four weeks' time off work) after 12 months (that is, on 20 September 2022), providing his employment was continuous.

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<sup>8</sup> Holidays Act 2003, s 15(a).

[96] However, by operation of s 16(2)(vi) of the Holidays Act, only the first week of LWOP counts towards the requisite 12 months of continuous employment. As the LWOP agreement was extended indefinitely, Mr Foden's employment therefore ended with no entitlement to annual leave having arisen.

[97] Mr Foden's holiday pay is to be calculated using the provisions of s 23(2) of the Holidays Act. This is a straightforward eight per cent of his gross earnings.

[98] At the Authority's request Smartlife provided payroll information for Mr Foden. This information was delayed while Mr Allan attempted to get his payroll provider Smartly, to correct errors with Mr Foden's leave balance, which did not reflect the LWOP arrangement, and was showing an inaccurate leave balance. This issue took several weeks to resolve.

[99] Mr Foden was given the opportunity to comment on the payroll information provided by Smartlife. He disputed the accuracy of the information, saying he had received more pay from Smartlife than the payroll information provided. He provided screenshots of his bank account to show these additional payments.

[100] He also clarified that Smartlife made reimbursement payments to him, for work related expenses such as parking, and warrants of fitness. Mr Foden did not allege that he was owed arrears because he had not received all of the payments captured by Smartlife's payroll system.

[101] Having reviewed the payroll information and considered the responses of both parties (including as to KiwiSaver obligations, the transaction dates and amounts for which appear to align with the payroll information), I am satisfied that Mr Foden's total gross earnings for the period of his employment comprise the sum of \$14,317.30, and that he has received wage payments of at least this sum.

[102] He is entitled to a payment for final holiday pay in the sum of eight per cent of this amount, being \$1145.38 (gross). Smartlife is to ensure appropriate KiwiSaver obligations are met in respect of this sum.

### *Breach of good faith*

[103] Mr Foden claims Smartlife breached its obligations of good faith in that it was misleading in its communications with him regarding full-time work; and by its failure

to provide access to information or the opportunity to comment on the information prior to making the decision to dismiss.

[104] He seeks a penalty for these breaches of good faith. By operation of s 136(1) of the Act, penalties recovered are paid into the Authority, for transfer to a Crown account. Mr Foden did not seek to have any penalties recovered paid to him.

[105] There is no evidence that Smartlife misled Mr Foden in its communications around his return to full-time work. Smartlife did not guarantee Mr Foden he would return to full-time work on a certain date and then resile from this guarantee. Smartlife did not mislead Mr Foden, nor did it breach its obligation under s 4(1A)(b) of the Act.

[106] In terms of Smartlife's failure to provide information prior to the dismissal and the opportunity to comment on this, it is not clear to the Authority how this alleged breach of good faith is distinct from the personal grievance for unjustified dismissal. As set out above, the Authority has awarded Mr Foden personal grievance remedies. The Authority is satisfied that the personal grievance provides Mr Foden with adequate remedy for the failure to provide information and the opportunity to comment.

[107] The Authority declines to exercise its discretion to order penalties in relation to the alleged breaches of good faith.

### *Interest*

[108] Because Smartlife failed to pay Mr Foden his notice entitlement under the employment agreement, or his accrued holiday pay on termination, he has been denied the use of money that he should have received. In such circumstances an order for payment of interest on this money is appropriate.<sup>9</sup> The entitlement to receive final holiday pay and the contractual four weeks' notice crystallised upon Mr Foden's termination. The period for the calculation of interest therefore runs from 22 May 2023 until the date that the sums referred to in the orders set out at [91], [92] and [102] above are paid in full.

[109] Interest is to be calculated by use of the civil debt interest calculator, accessible via the Ministry of Justice website.<sup>10</sup>

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<sup>9</sup> Employment Relations Act 2000, sch 2, cl 11.

<sup>10</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

[110] Interest is to be paid within 28 days of the date of this determination.

### **Summary of orders**

[111] Within 28 days of the date of this determination, Smartlife Whangarei Limited must pay to Mark Foden the following amounts:

- (a) compensation in the sum of \$16,000.00 (without deduction) under s 123(1)(c)(i) of the Act; and
- (b) wage arrears in respect of unpaid contractual notice in the sum of \$6153.92 (gross), plus holiday pay on this in the sum of \$492.31 (gross); and
- (c) holiday pay arrears in the sum of \$1145.38 (gross); and
- (d) interest on the amounts referred to in (b) and (c) above, in the manner prescribed at [110] to [112] above.

[112] Smartlife is to ensure appropriate KiwiSaver obligations are met.

### **Costs**

[113] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If this is not possible, Mr Foden is to lodge and serve a costs memorandum within 14 days of the date of this determination, and Smartlife may lodge and serve any reply costs memorandum with a further 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[114] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>11</sup>

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>11</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).