

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 143
3036613

BETWEEN GNH
 Applicant

AND KOV
 Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
 Respondent in person

Investigation Meeting: 30 January 2019, 19 February 2019 and 28 February
 2019

Submissions Received: 30 January 2019 and 28 February 2019 from the
 Applicant
 19 February 2019 from the Respondent

Date of Determination: 11 March 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] KOV employed GNH as a casual employee to provide care for her son. KOV receives government funding for the care required for her son, which is used to pay caregivers such as GNH. This funding is administered through a funding facilitation organisation but KOV is the employer of, and is personally responsible for payment to, GNH and the other caregivers she engages to provide care for her son.

[2] GNH says that although he was employed on a casual basis, he worked regular shifts for KOV including every Tuesday.

[3] In December 2017, January 2018 and February 2018 there were three public holidays that fell on Tuesday. GNH says he did not work these public holidays and was not paid for his normal shifts on those days. GNH says that as the three public holidays, which he did not work, were otherwise working days for him and he should have been paid for them.

[4] GNH has applied to the Authority for payment for these public holidays. GNH also seeks a penalty for KOV's failure to pay him for these public holidays.

[5] KOV says she employed GNH as a casual employee; this was how the funding facilitation organisation advised her to engage him. KOV also says she understood from the funding facilitation organisation, that as GNH was a casual employee she did not have to pay him for public holidays that he did not work.

Non-publication

[6] I believe there is some sensitivity in respect of this matter given the underlying funding that KOV receives. In particular, I am concerned about any negative inferences or impacts of my determination on KOV's son for whom the funding is provided and wish to prevent that. Therefore, I have decided it is appropriate that I prohibit from publication the parties' identities.

[7] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

- (a) the name of GNH, the applicant in the application before the Authority, and any information which may lead to his identification – he is referred to as GNH in this determination; and
- (b) the name of KOV, the respondent in the application before the Authority, and any information which may lead to her identification – she is referred to as KOV in this determination

Wage arrears

[8] I conducted my investigation into this matter by telephone dealing with GNH and KOV separately. Having completed my investigation into this matter, I conclude:

- (a) GNH worked a regular shift pattern that meant Tuesday was a normal working day for him.
- (b) GNH did not work public holidays on 26 December 2017, 2 January 2018 and 6 February 2018, which all fell on a Tuesday.
- (c) As a result, GNH is entitled to payment for these unworked public holidays, as they were otherwise a normal working day for him.¹

[9] I make an order that KOV is to pay GNH \$199.50 (gross) for public holidays he did not work which were otherwise normal working days for him.

[10] I also award interest on this sum of \$7.41.

Penalty

[11] KOV failed to pay GNH for the public holidays, which he did not work, but were otherwise normal working days for him. Each failure to pay is a breach of the Holidays Act 2003.²

[12] Pursuant to s 75 of the Holidays Act a person who breaches the Holidays Act by failing to pay an employee for public holidays, as in this case, is liable to a penalty of up to \$10,000.00.

[13] I am satisfied that it is appropriate to impose a penalty for these breaches.

[14] In *Nicholson v Ford*³ Chief Judge Inglis provided guidance on imposing penalties, balancing:

- (a) Section 133A of the Act, which relates to the imposition of penalties by the Court and the Authority;

¹ Pursuant to s 49 of the Holidays Act 2003.

² Section 49 of the Holidays Act 2003.

³ [2018] NZEmpC 132.

(b) *Borsboom v Preet PVT Ltd*⁴ which sets out a four step process for assessing penalties for breaches of minimum standards; and

(c) Any other relevant factors to be taken into account, when imposing penalties.

[15] I have applied this guidance by the Chief Judge. In particular, I have considered KOV's personal circumstances to be significant. The other relevant factors include that this was essentially a single breach by KOV and that KOV relied on the funding facilitation organisation in how she structured the care for her son and how she made payments, including not paying GNH for the public holidays he did not work.

[16] Having assessed all of the relevant matters I determine that \$100.00 is an appropriate penalty to impose in all the circumstances.

[17] Having regard to all the other relevant circumstances of the case, I have decided to exercise my discretion under s 136(2) of the Act to award the entire penalty to GNH.

Summary of orders

[18] KOV is to pay GNH:

(a) \$199.50 (gross) as wages for public holidays that he did not work but were otherwise normal working days for him;

(b) Interest on the outstanding wages for public holidays of \$7.41;

(c) A penalty of \$100.00.

Costs

[19] GNH is entitled to the filing fee on the statement of problem. I also order that KOV pay GNH the sum of \$71.56.

Peter van Keulen
Member of the Employment Relations Authority

⁴ [2016] NZEmpC 178.