

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 282
5448480

BETWEEN CHRISTOPHER DAVID
GOLD
Applicant

A N D MODERN ELECTRICAL
SOLUTIONS LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Vimlesh Sharma, Advocate for the Respondent

Investigation Meeting: 28 May 2014 at Auckland

Date of Determination: 3 July 2014

SECOND DETERMINATION OF THE AUTHORITY

The original determination

[1] In my original determination concerning the employment relationship problem between these parties which was issued on 16 June 2014 as [2014] NZERA Auckland 232, I made orders in favour of Mr Gold for unpaid holiday pay and unpaid notice.

[2] I reserved leave for MES to revert to me with further and better particulars about Mr Gold's claim that he was owed an amount of overtime which he estimated at \$8,000 gross.

[3] As I observed in the original determination, Mr Gold gave evidence to the effect that he thought MES would have the records to support his entitlement to that additional sum. Because those records were not before me when I conducted the investigation meeting and prepared my original determination, I gave MES the

opportunity to file any material it wanted me to consider prior to my dealing with Mr Gold's claim for overtime.

[4] The Authority has heard nothing from MES within the stipulated time and accordingly I need to now deal with Mr Gold's claim for overtime.

Determination

[5] I observed in the original determination that in reliance on s.132 of the Employment Relations Act 2000 (the Act), I am entitled to prefer Mr Gold's evidence to that of the employer, when the employer ought to have produced wage and time records, did not do so and thus prejudiced the employee's ability to accurately calculate what he is owed.

[6] This is a situation where MES not only failed to produce that material for consideration prior to the investigation meeting but has also failed to take the opportunity I provided to deal with it after the issue of my first determination between the parties.

[7] It would be unfair and unjust for Mr Gold to be penalised because of the default of the employer. This is precisely the situation provided for in s.132 of the Act; default by the employer in providing proper wage and time records, a claim by the employee for payment based on his best understanding of the position and a statutory presumption in favour of the employee's evidence in the absence of any alternative evidence provided by the employer.

[8] As I indicated in the original determination, I am satisfied that Mr Gold was on call for more than the 40 hours a week he was paid (both parties agree that that was the position) and therefore on the principles I enunciated in the original determination, I am satisfied Mr Gold is entitled to payment.

[9] This was a case where the parties were in agreement about the span of hours that were required of the employee; the argument was about the payment regime. MES maintained that Mr Gold was entitled to 40 hours payment per week simpliciter but the law is clear that a requirement that an employee be available to work creates an entitlement to wages in exactly the same way as the actual performance of work creates such an entitlement.

[10] Here, it is not suggested by either Mr Gold or by MES that Mr Gold never performed work outside of the 40 hour window; what MES seems to allege is that because he was on call for principally 12 hours a day during the employment but would not be working for all of those 12 hours, his only entitlement to payment was the bare 40 hours.

[11] Conversely, Mr Gold understood (correctly in my view) that the 40 hours payment was a minimum. That is what the employment agreement says although the agreement is silent about the entitlement to payment thereafter. But if 40 hours pay is “*a minimum*”, there must be an entitlement to payment for work beyond the 40 hours window.

[12] Because I have nothing before me from MES which would assist me to calculate that additional entitlement on any other basis than the one used by Mr Gold, I am left to rely on Mr Gold’s calculation which I do using the power conferred on me by s.132 of the Act and I now direct that MES is to pay to Mr Gold the sum of \$8,000 gross as additional wages due to him for work performed for MES over and above the 40 hours wages paid to him for each and every week of the employment.

[13] For the avoidance of doubt, that \$8,000 gross is in addition to the orders I have made in the original determination of 16 June last concerning holiday pay and notice.

James Crichton
Member of the Employment Relations Authority