IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 385
3030664

	BETWEEN	GLENN HUNTER Applicant
	AND	NEW ZEALAND DIVING AND SALVAGE LIIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Nathan Santesso, advocate for the Applicant Michael Gould, counsel for the Respondent
Investigation Meeting:	28 August 2018
Submissions received:	30 August and 7 September 2018 from the Applicant 3 September 2018 from the Respondent
Date of determination:	30 November 2018

DETERMINATION OF THE AUTHORITY

A. **Glenn Hunter is not owed any money by New Zealand Diving and Salvage Ltd for days in lieu.**

B. **New Zealand Diving and Salvage Ltd breached s 130 of the Employment Relations Act 2000 concerning keeping records of Mr Hunter's hours of work.**

C. **Within 28 days of the date of this determination New Zealand Diving and Salvage Ltd is ordered to pay a penalty of $2,000.00. Of that sum, $1,000.00 is to be paid to the Employment Relations**

Authority for payment into the Crown account and $1,000.00 is to be paid to Mr Hunter.

D. A timetable is set for submissions on costs, if the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Glenn Hunter is a commercial diver. He worked for New Zealand Diving and Salvage Ltd (NZDS or the company) from 2005 to 2018 as a salvage diver and dive supervisor. NZDS carries on business as an underwater specialist for construction, inspection, installation and salvage.

[2] Mr Hunter claims that he is owed money by NZDS for days in lieu due to time he worked in the weekends and/or for more than five days' work in a row. NZDS denies Mr Hunter's claim, saying that, at least from late 2008, onwards he did not have any entitlement to receive cash for days in lieu, and that he did not notify the company that he had any lieu time owing to him.

[3] An investigation meeting was held on 28 August 2018 and I heard evidence from Mr Hunter and Sol Fergus (Mr Fergus), General Manager of NZDS. Mr Fergus's father Dougal Fergus was one of the original founders of the company and his mother Gabriel Fergus was also involved in the company. Mr Fergus worked for NZDS for a little under a year in around 2007 and then started on a permanent basis in 2010.

[4] It was agreed that this investigation meeting would consider the question of liability. If liability is found then the parties should attempt to resolve the issue of quantum and if unable to do so, the Authority would then consider that matter.

[5] To provide some sense of the size of Mr Hunter's claims, at one point he estimated the amount owing as at 2017 to be slightly over $100,000. His employment continued until 2018 so it is likely that the final claim is larger. There was some difficulty in quantifying his claim.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated

findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[7] The issues for investigation and determination at this stage are:

(a) Whether Mr Hunter was entitled to days off in lieu which he can require payment for now, and if so, for what period?

(b) Was NZDS in breach of its obligation under s 130 of the Act to keep wages and time records?

(c) If so, should NZDS be subject to a penalty?

[8] Mr Hunter is only claiming entitlements covering the period from 2008 to 2018, not for the earlier period of his employment. This was said to be on the basis that there are no records from before 2008 on which to base a claim. Also, my impression from Mr Hunter's evidence was that the work he undertook prior to 2008 was not the type of work which would incur lieu days. I proceed on the basis that the claim only concerns 2008 onwards.

[9] There was some confusion caused by the reference to lieu days on Mr Hunter's payslips, towards the end of his employment. The payslips provided for hours lieu leave balance. However, at the meeting it was clarified that that entry refers to lieu day entitlements, now known as alternative holidays, incurred when an employee works on a public holiday. Mr Hunter was paid for that time at the end of his employment.

Mr Hunter's work

[10] The parties entered into an employment agreement in late 2004, with Mr Hunter commencing work for NZDS in early 2005. The focus of his work for the first few years or so was a contract which NZDS had to survey container ships entering New Zealand ports.

[11] After that contract was completed, Mr Hunter remained working for NZDS as a general diving supervisor and instructor.

[12] Mr Hunter says that his hours changed through the 2008 period. Some weekend work was required on projects and sometimes he would work for a period without any break.

[13] Mr Hunter was based in Auckland whereas the NZDS head office was in Wellington. For most of his employment he was the sole employee in Auckland. During that time Mr Hunter managed the company's operations in Auckland and reported to the operations manager and general manager, both of whom were based in Wellington. For a short period in around 2013 NZDS appointed a manager in Auckland who Mr Hunter reported to.

[14] Mr Hunter did have some responsibilities during the time he was not out on jobs, including administrative tasks and maintenance of equipment and vehicles. However, I accept Mr Fergus's evidence that Mr Hunter was largely left to his own devices when he was not required for dive projects. This was seen as a stand down period, when Mr Hunter had to be available for work but had limited tasks to attend to. Customers did not come in to the office. For some of the time covered by the claim Mr Hunter worked from home.

[15] Although Mr Hunter had some flexibility about the non-project time, he still had to apply if he wanted to take annual leave during these periods.

Applicable employment agreement

[16] Mr Hunter's claim is at least partially dependent on which employment agreement was in force for the bulk of the period in which days in lieu are claimed. NZDS says that a 2008 agreement was in force from the start of 2009 onwards, whereas Mr Hunter relies on a 2004 agreement continuing to be operative until the end of his employment.

The 2004 employment agreement

[17] Prior to Mr Hunter starting work the parties signed an employment agreement (the 2004 employment agreement). Clause 8 of that agreement provided:

> Your expected hours of work are Monday – Friday 0830 – 1700. Work outside these hours will be required due to the nature of the work. It is expressly understood that these hours are incorporated in the salary payment.
> **Days off in lieu** will be given for periods of extended operations. The days off in lieu entitlement shall be agreed with the General Manager as they are accrued and a record kept by the Administration Manager. It is the preferred

> intention of the parties that days off in lieu are taken at a mutually agreeable time. At the same time as salary review … is carried out, the number of outstanding days in lieu will also be considered.
> Days in lieu may be en-cashed at the day rate of $200.80 per day (calculated by dividing the annual salary by 249 days. *(underlining added)*

Communication about the employment agreement in 2007

[18] In March 2007 Gabriel Fergus, who undertook office administration, faxed a copy of the 2004 agreement to Mr Hunter and asked him to forward a renewed draft to him. The reason for the reconsideration of Mr Hunter's agreement at this point is not clear.

[19] Mr Hunter made some handwritten changes and notes on the 2004 agreement and sent it back to Ms Fergus. The changes he proposed included a salary increase from $50,000 under the 2004 agreement to $62,000. The first paragraph of the hours of work clause has a note "probably not applicable any more", with parenthesis and a question mark to the left of that paragraph. The next paragraph starting "Days off in lieu" in bold type, is not changed. The third paragraph has the day rate changed to $248.99, presumably to reflect the salary increase claimed.

[20] No typed agreement from 2007 reflecting Mr Hunter's changes was filed or appears to have been signed. I am not satisfied there was agreement in 2007 to change the terms of Mr Hunter's employment.

Creation of the 2008 employment agreement

[21] Mr Hunter was concerned that he was earning less than contractors who were working for NZDS, including some under his supervision. He had been assured by either Dougal or Gabriel Fergus that if he did the calculations based on his actual hours of work he would find that he was being paid the same or possibly a bit more than contractors.

[22] A meeting was held between the parties on 31 October 2008 to talk about this issue and minutes were kept. Mr Hunter provided a figure for a nominal contractor's earnings from January to October 2008. Details of his salary and other pay component were compared. NZDS calculated that 229 days worked a year was the company's expectation, at five days a week, less various holidays. By contrast Mr Hunter had worked almost 50 days less than that, according to the sheets he compiled

of his 2008 work. Mr Hunter pointed out that there were also days when he was on standby and had to be available.

[23] Mr Hunter indicated that he had not had a salary increase in four years. Ms Fergus asked Mr Hunter to make a decision whether to remain on salary or change to a contractor role. A salary offer was made to Mr Hunter at the meeting and he was urged to consider the pros and cons of contractor versus salary. Dougal Fergus stressed that he wished to be a fair and reasonable employer and if Mr Hunter decided to contract, he would give him as much work as he possibly could.

[24] Ms Fergus emailed Mr Hunter on 3 November 2008, setting out a description of components of Mr Hunter's salary and how NZDS salaries are made up. Ms Fergus provided an equivalent contractor rate based on the hours specified by Mr Hunter in his sheets and asked him, at his convenience, to advise whether he accepts the salary offer.

[25] There may have been subsequent discussion in November although there is no evidence of it. Ms Fergus then sent a letter on 28 November 2008 to Mr Hunter enclosing an employment agreement and asking him, after reading it, to sign and return one copy to her by 15 December 2008. The agreement document is mistakenly dated on the front as 2009, rather than 2008.

[26] Ms Fergus made what appear to be two separate handwritten notes on the front page of the 2008 agreement. The first says:

> NZDS copy until signed copy returned.

[27] The second is dated 17 December 2008, signed by Ms Fergus and reads:

> Glenn queried daily hours, agreed not to put a number of hours but allow flex for both parties. Holidays as per NZ standard 4 weeks. Stat leave days.

[28] NZDS's original of the signed agreement has a handwritten note which Mr Hunter accepts is his. This appears to be consistent with Ms Fergus's note of 17 December 2008. Mr Hunter wrote "hours" near the reference in the hours of work clause to Monday to Friday. He also put question marks next to the top of the hours of work clause, and the company policy and legislation clause.

[29] The agreement is dated as signed for NZDS on 28 November 2008 and by Mr Hunter on 28 December 2008. However, it appears that Mr Hunter did not send the

agreement at that point or else it got held up in holiday mail, as Ms Fergus had not received it by 6 January 2009. She emailed him then and asked for the signed contract to be returned as without it she is unable to change his pay rate.

[30] Mr Hunter's evidence conflicts with the documents. His recollection is that he was only given the agreement document in early 2009 by a visiting manager, to be signed immediately and that he signed and backdated it at that point. Mr Hunter was unable to recall the 28 November 2008 letter enclosing the agreement and did not provide an explanation for having received the email when he says he had not got the contact at that point. I am satisfied that Mr Hunter signed the agreement on 28 December 2008.

[31] Mr Hunter understood that he would not get paid unless it was signed, based on the email stating that the wage payment could not be changed until he provided the signed agreement.

2008 employment agreement

[32] The 2008 agreement is quite similar to the 2004 agreement in style and content but does contain some changes.

[33] Clause 3, the hours of work clause in the 2008 agreement, provided:

> Your expected hours of work are Monday – Friday but work outside these hours will be required due to the nature of the industry. It is expressly understood that these hours are incorporated in the salary payment.
> Days off in lieu will be given for periods of extended operations (e.g. More than five days continuous operations). The days off in lieu entitlement shall be agreed in writing with either the General Manager as they are accrued and a record kept by the Administration Manager. It is the preferred intention of both parties that days off in lieu are taken at a mutually agreed time.

[34] The provision in the 2004 agreement regarding the encashing, or conversion into money, of days off in lieu is not included in the 2008 agreement and there is no provision for payment of days in lieu on termination.

Applicability of the 2008 agreement

[35] Mr Hunter's advocate Mr Santesso argues that the 2008 agreement should not be applicable. This was on the basis that the 2008 agreement only amounted to a variation of Mr Hunter's salary and he was not aware of other changes as they were

never discussed or brought to his attention. There is said to be no evidence of Mr Hunter being aware of these "subtle changes", let alone understanding and agreeing to them. Therefore there was no genuine consent to the variations.

[36] Mr Santesso relies on *Coffey v Commissioner of Police*[1] to support variations to an employment agreement requiring the employee's full knowledge of what the variation is all about and being given proper opportunity to obtain independent advice.

[37] Counsel for NZDS Mr Gould says that the 2008 agreement was the operative agreement, superseding earlier agreements, including what had been put forward by Mr Hunter in 2007.

[38] Good faith behaviour is required when parties are dealing with each other about variations to individual employment agreements.[2] There is no evidence of Mr Hunter being advised about the entitlement to take independent advice, as is required by s 63A(2)(b) of the Act. However, by virtue of s 63A(4), failure to comply with the requirements of that section does not affect the validity of the employment agreement.

[39] Mr Hunter's evidence of his lack of involvement in the changing of the agreement and the circumstances of the draft agreement being provided to him was unconvincing and contrary to the documentary evidence available.

[40] The evidence does not support the concept of Mr Hunter as uninvolved or ill-informed regarding employment agreement issues and the 2008 changes in particular.

[41] Firstly, in 2007 Mr Hunter had queried and suggested amendments to several provisions. He questioned the current applicability of provisions in the 2004 agreement, proposed specific changes to salary, sick leave, annual leave and day rate entitlements. He asked questions about the company's policy on ongoing education and extending his qualifications.

[42] Then, by 2008, Mr Hunter wanted to explore the possibility of becoming a contractor with NZDS rather than an employee. The parties had a meeting and a

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[1] *Coffey v Commissioner of Police* [2014] NZEmpC194 at [47]
[2] S 60(c)(ia) of the Act

higher salary offer was made. Details regarding employee and contractor rates and the salary offer were later emailed through to Mr Hunter in early November. Then at the end of November a written agreement was sent to him.

[43] In mid-December 2008 Mr Hunter contacted Ms Fergus with some queries and a discussion occurred and was noted. By early January 2008 Mr Hunter had had the agreement for two months and is prompted to return it. In these circumstances I do not consider the reference to not being able to change the wage payment, without the signed contract, to amount to illegitimate pressure on Mr Hunter.

[44] Mr Hunter's position regarding the contract was inconsistent. He emphasised that he signed the contract thinking that it was about a salary change and "didn't pick up on finer details" and yet he noted down the hours question above the hours of work clause and also had put question marks beside other clauses. He discussed his issues with Ms Fergus.

[45] I conclude that Mr Hunter was offered the 2008 agreement following a meeting to discuss his concerns. The letter from Ms Fergus invited him to read it through and if he had any queries, to contact her. He then did so. He had substantial time to consider the agreement, which is a short two-page document with six causes, albeit with some sub-clauses.

[46] I am satisfied that Mr Hunter consented to the variation of his employment agreement and was bound by it.

Any previous days in lieu entitlements

[47] If Mr Hunter had any days in lieu owing to him as at 28 December 2008 when he signed the agreement, what became of them once he signed? There is no evidence that he ever cashed up any lieu days.

[48] The 2008 agreement makes no provision for encashment of days in lieu. I find that any days which Mr Hunter became entitled to prior to 28 December 2008 continued as days in lieu entitlements under the 2008 agreement. What Mr Hunter became entitled to for those days is to be determined on the basis of the 2008 agreement, rather than the 2004 agreement.

2008 clause

[49] The 2008 clause has a cascading set of conditions which must be met. However, firstly I note that it is compulsory, rather than discretionary in nature. It states that days in lieu "will be given" for periods of extended operations.

[50] In order to establish whether an entitlement to a day in lieu arose, an interpretation of "extended operations" if needed. The clause provides an example, namely more than five days of continuous operations. The interpretation of extended operations and its application can be considered under quantum, if quantum needs to be considered.

[51] The clause also requires that days off in lieu shall be agreed in writing with the general manager as they are accrued. The parties agree that there is no agreement from any general manager, as specified in the clause, or from anyone else for that matter, to Mr Hunter having accumulated lieu days from extended operations.

[52] NZDS says that it was Mr Hunter's responsibility to advise the general manager when he considered that he had become entitled to days in lieu. Neither the general manager nor the operations manager was in a position to keep records of any time in lieu unless advised by Mr Hunter, due to him working on his own for substantial periods of time.

[53] There was no suggestion that Mr Hunter's work situation made it difficult or impossible for him to take any days in lieu. My impression is that there were sufficient stand by days which could have been converted into days in lieu should he have made the claim. Had Mr Hunter raised claims more promptly with NZDS whilst employed and not been able to get agreement from the general manager, a different type of claim might have been presented to the Authority.

[54] The clause also requires that a record shall be kept by the administration manager. There was no record kept because there was no agreement reached. Mr Hunter says that he understood the administration manager was taking a record of his time because that was what the days in lieu provision says. How that person was supposed to know his hours when he did not send in any record, except when on dive projects, was unclear.

[55] The clause sets out the preferred intention of the parties being that days off in lieu are taken at a mutually agreeable time. There is no provision as to what happens if they are not.

Additional arrangements

[56] In addition to the 2008 agreement, Mr Hunter had some periods when he was undertaking particular projects for NZDS in other areas of New Zealand or overseas. On these occasions agreements specific to the project were reached between Mr Hunter and NZDS and special rates or allowances were paid which, at least usually, included a statement that the allowance covered all the work required and no time off in lieu would be accrued.

Mr Hunter's pursuit of his claim

[57] I now examine Mr Hunter's efforts to raise a claim for days in lieu.

[58] Before Mr Hunter announced his resignation in 2018 he made only a modest attempt to raise any issue about lieu days with NZDS. This lack of action seemed inconsistent with his willingness to raise other employment issues, such as what was happening with company bonuses. Although based in Auckland, Mr Hunter did at times work from the Wellington head office and in any event, had regular catch ups with NZDS managers on the phone. He discussed his performance annually as this fed into the bonus process. He also pursued a claim for annual leave when the company changed its payroll system in 2017. He did not raise any issue about lieu days during these various discussions.

[59] Despite him holding some records going back to 2009, Mr Hunter failed to produce any documents showing that he provided the days in lieu claim to his employer in 2008 or 2009.

[60] Mr Hunter gave evidence which I found vague, regarding having made a claim for 38 days in lieu in 2009. If accepted, this would have entitled him to two months of paid time off work, which is substantial. And yet Mr Hunter was unable to provide details regarding the circumstances or manner in which he made that claim. He also could not recall what the response was, other than having a sense that the company was trying to sweep it under the carpet.

[61] Mr Hunter said that as a new employee he felt that if he pursued it, it would jeopardise his career. At that stage he had been employed for almost five years.

[62] At some point the record which Mr Hunter created for the assessment of contractor versus salary pay was adapted by him to determine his lieu day claim. However, Mr Hunter's evidence of thinking that he had provided this to NZDS in 2009 was not compelling.

[63] There is a reference to the prospect of Mr Hunter taking a lieu day in an email of 3 March 2009 from the office manager. However, given the occasional reference to lieu days as relating to public holidays, it is not clear what type of lieu day is referred to in the email.

[64] I am left in the position of not being satisfied that days in lieu for extended operations were raised by Mr Hunter in 2008 or 2009. I accept that it can be difficult for employees to raise issues about entitlements. However, I find it somewhat improbable that Mr Hunter genuinely believed that he had almost six years of very substantial lieu day entitlements without making any mention of it to NZDS management.

[65] The day in lieu issue was clearly raised in 2013 by Mr Hunter and the then Auckland manager, although seemingly without quantification of any amounts. An email received from Dougal Fergus on 7 January 2013 says:

> Regarding leave in your contracts there is no days in lieu working weekends and overtime when required is a build in part of the salary package. There has been times where it goes mad but that is the type of business we are in.

[66] Dougal Fergus concludes by asking the men to think on this over the weekend and says "I welcome your feedback so we can all move ahead as a unified team".

[67] There is no indication that Mr Hunter provided any feedback at that stage. He says that he took the email to mean that the company did not regard there as being any lieu days entitlement.

[68] NZDS says the email reflects the agreement not providing for days in lieu simply for work outside the Monday to Friday period, but rather only for extended operations, which may or may not be on weekends.

[69] Mr Hunter accepts that he did not raise the issue of lieu days between 2013 and 2018, when he mentioned it in his resignation letter.

Claim on resignation

[70] In January 2018 Mr Hunter told NZDS that he was resigning. A discussion occurred with Mr Fergus about notice and a three month period was agreed. Mr Hunter was unhappy with that discussion and the outcome.

[71] Mr Hunter's resignation letter of 7 January 2018 to Mr Fergus refers to having accumulated a substantial number of days in lieu, estimated at 35 days per year from 2008 onwards, and totalling 315 days.

[72] At board meetings Mr Fergus had frequently reported on staff with large amounts of leave owing. He was stunned to receive Mr Hunter's resignation letter claiming 315 days of lieu time. When he spoke to Mr Hunter, Mr Hunter said that it was an estimate and that everything was negotiable. Mr Fergus says that the company's board would never have allowed such a large number of days in lieu to have accrued. It would be most unusual for an employer to allow the accrual of such a substantial amount of time, had it been aware of the time.

[73] After Mr Hunter made his claim NZDS staff went through a substantial number of documents from 2008 onwards in order to obtain information to feed into a spread sheet which it created about Mr Hunter's work time. It accepts that the sheet is not entirely accurate.

Payment on termination of employment

[74] Given that Mr Hunter has now concluded his employment with NZDS for his claim to succeed he must establish an entitlement to conversion of days in lieu into payment.

[75] The 2004 agreement provided for days in lieu to be "encashed"' presumably meaning cashed in, at a particular daily rate. The 2008 agreement contains no such reference.

[76] Mr Gould says therefore that there is no entitlement for cash payment, on termination, or indeed during the employment relationship. It relies on several decisions of the Authority in support of its argument that where there is no contractual obligation to make payment, there is no entitlement to receive any payment for lieu days on termination of employment.[3]

[77] Mr Santesso's submissions were largely based on the 2004 agreement, containing the encashment clause, still being in force after 2008. I have found that it was not.

[78] In *Clerical Workers Union v New Zealand Equity & Entertainment Union Inc*[4] Chief Judge Goddard implied into an employment contract giving time in lieu for overtime, a term that any time off in lieu not taken within a reasonable time and in any case, before termination of employment, was lost.

[79] Without a contractual entitlement to payment, some representation founding an estoppel or the like, Mr Hunter is not entitled to payment for days in lieu. He has not established an entitlement to payment.

Section 132 of the Act

[80] The parties referred to section 132 of the Act which permits the Authority to accept an employee's claims as correct in terms of the hours, days and times worked, where the employer has failed to keep wage and time records. However, s 132 permits the Authority to accept claims by an employee, it does not mean that the Authority must accept the claims as proved.[5]

[81] Had I accepted that Mr Hunter had an entitlement to be paid out for days in lieu, the section would have been considered. However, I have not found such an entitlement.

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[3] *Cronin v Laura Ashley (Auckland) Pty Ltd* (unrep) AA180/02, 13 June 2002, Member Oldfield, *Spence v Department of Corrections* (2003) 7 NZELC 98,735, *Phillips v Hauraki Marine Ltd* (unrep) AEA 1018/05, 5 April 2006, Member Urlich, and *Hardikar v Klein Ltd* [2013] NZERA 272

[4] *Clerical Workers Union v New Zealand Equity & Entertainment Union Inc* [1991] 2 ERNZ 922 at p 928-929

[5] *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136

Wages and Time Records

[82] Mr Hunter claims that NZDS did not keep wages and time records which comply with s 130 of the Act and should be penalised for that. NZDS denies that it breached the section, saying that records kept comply with the requirements.

[83] The records kept do not show Mr Hunter's hours of work. The daily operations reports contain that information for some days only, but are not easily accessed.

[84] Section 130 of the Act was amended in 2016. The provision in place from 2000 to 2016 reads:

> (1) Every employer must at all times keep a record…showing, in the case of each employee employed by that employer: …
>
> (g) where necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period:

[85] From 1 April 2016 s 130(1) was amended to read:

> (g) the number of hours worked each day in a pay period and the pay for those hours.

Pre-2016 situation

[86] Mr Santesso submits that records of when Mr Hunter worked Saturdays or Sundays were needed so that he could tell the value of his lieu days if he was to use them or encash then, as the rate of calculation was dependent on what he was earning at the time of each accrued lieu day.

[87] I do not accept the argument that the rate at which lieu days were paid relied on the record. Even if the 2004 agreement still applied, the rate for the value of a day in lieu was set as a dollar figure in the clause. The 2008 agreement had no encashment provision with a dollar figure but Mr Hunter would have been entitled to his usual salary pay if he took a day in lieu.

[88] The proviso to s 130(1)(g) prior to 2016 was that "where necessary for calculating the employee's pay" hours and days shall be kept. Mr Hunter was on a fixed salary and records were kept of his operational work. There was thus no requirement prior to 2016 to keep records of hours and days of work.

2016 onwards

[89] From 1 April 2016 the Act requires the record to specify the number of hours worked each day in a pay period and the pay for those hours. Where the number of hours worked each day, and the pay for them, are agreed and the employee works those hours (the usual hours), it is sufficient compliance if the usual hours and pay are stated in the wages and time record, the employment agreement, or a roster or the like.[6]

[90] For NZDS, criticism is made of Mr Hunter as the responsibilities list in the 2008 agreement required him to:

> Maintain and forward to head office the following records:
> … **Every day:**
> Daily operations reports
> **… Weekly:**
> Day to day personnel time sheets

[91] Mr Hunter forwarded daily operations reports when dive or other operations were underway, which included his hours of work. These were used to pay contractors and bill clients. However, Mr Hunter did not forward personnel time sheets for himself as he saw that requirement as only applying to other people's hours and so there is no record of which hours he worked when he was not carrying out dive operations.

[92] Mr Fergus says that until about mid-2017 for NZDS salaried employees, as they were paid regardless of hours, the records regarding the hours were quite loose. Then from around late 2017 NZDS implemented a revised payroll system which does capture hours. Individual employees log on and record their hours. Mr Fergus understands that an email was sent out saying that an app was available in order for that to happen. Mr Fergus understands that there are no such hours available for Mr Hunter as he did not use the app.

[93] I do not regard Mr Hunter's failings as completely excusing NZDS. There was no evidence that NZDS followed up with Mr Hunter to seek timesheets or ensure use of the app.

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[6] S 130(1B) of the Act

[94] There is no record of Mr Hunter's hours in the wages and time record, nor in his employment agreement which does not specify hours, just the expected days of work. There is no roster which establishes which hours he worked and the daily operations reports do not cover all work days. I conclude that NZDS breached s 130 of the Act concerning keeping records of Mr Hunter's hours of work.

Penalty

[95] This matter is not so minor or unintentional that no penalty should be imposed. Following the decision of Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd (Preet)*[7] I now apply the four-step test to assess the appropriate penalty. I will refer to factors from s 133A of the Act where relevant.

Step One

[96] Step one is to identity the nature and number of breaches. Here there is one breach of the Act. The maximum penalty for a company for a breach of s 130 of the Act is $20,000.

Step Two

[97] Step two involves assessing the severity of the breach, including consideration of aggravating and mitigating factors.

[98] Record keeping breaches are often seen as less serious than matters involving a failure to pay. However, record keeping is important as it helps ensure that minimum entitlements have been complied with.

[99] There is not a complete absence of records here. There is no allegation that other aspects of s 130(1) have not been complied with. The sole issue is the reference to hours of work and the pay for those hours. The records show the wages which Mr Hunter received each pay period. I allocate 20% liability of the maximum penalty regarding this breach, leaving a provisional penalty of $4,000.

[100] There is an absence of aggravating factors. Mr Hunter is not a vulnerable employee and was not singled out from other employees. I do not accept that the failure to record was designed to deprive Mr Hunter of entitlements.

[7] [2016] NZEmpC 143

[101] There was no evidence that NZDS had been investigated or brought to the Authority previously regarding minimum entitlement or record keeping issues. NZDS cooperated with Mr Hunter's representative and the Authority by providing documents and attempting to determine what Mr Hunter's work patterns had been. The spreadsheet's partial inaccuracies do not detract from this.

[102] I accept that the absence of records made the quantification of Mr Hunter's claim for the Authority more difficult. However, given that I have found that he did not have an entitlement to be paid out for days in lieu, I do not give this matter significant weight.

[103] There is little evidence regarding whether the breach was deliberate, inadvertent or accidental. My conclusion is that it was at worst inadvertent.

[104] There are mitigating factors. In about late-2017 the new payroll programme was introduced which enabled better keeping of records with the app available. Given that Mr Hunter handed in his resignation in early January 2018, NZDS's failure to ensure Mr Morgan was using the app was brief.

[105] Taking into account all these matters I reduce the provisional penalty by 50%, taking it to $2,000.

Step Three

[106] Step Three requires consideration of the means and ability to pay, which may result in a downwards adjustment. There was no evidence or submissions that NZDS could not pay a penalty.

Step Four

[107] Step Four involves the proportionality or totality test; whether the provisional penalty after the first three steps is proportionate to the seriousness of the breach and any harm occasioned by it.

[108] The s 130(1)(g) requirement under the 2016 amendment was relatively new. NZDS took steps to correct its practices. However, it still took around a year and a half for the new payroll system and app to be introduced. Amendments to the minimum code should be taken seriously with employers acting promptly to comply. I consider that some specific and general deterrence is needed.

[109] Standing back and considering the situation overall, the sum of $2,000 is the appropriate penalty and does not need to be adjusted. A portion of that penalty should go to Mr Hunter. I order NZDS to pay a penalty of $2,000.00 within 28 days of the date of this determination. Of that penalty $1,000.00 is to be paid to the Employment Relations Authority for transfer into the Crown account. The other $1,000.00 is to be paid directly to Mr Hunter.

Costs

[110] Costs are reserved. The parties are invited to resolve the matter. Both parties have had a degree of success and could expect that to be reflected in any costs determination. If the parties are unable to resolve the costs issue, they shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply. All submissions seeking costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority