

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 40
5598715

BETWEEN EMMA JOHNSTON
Applicant

AND EAST CITY TOWING &
SALVAGE LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Applicant in person
Michael Holliday, Director of the Respondent

Investigation Meeting: On the papers

Date of Determination 10 February 2016

DETERMINATION OF THE AUTHORITY

- A. East City Towing & Salvage Limited must pay Emma Johnston the following amounts of unpaid holiday pay within 14 days of the date of this determination:**
- (i) \$3646.44 gross for the period, 22 November 2009 until 28 February 2011;**
 - (ii) \$1180.08 gross for the period, 1 March 2011 and 31 July 2011; and,**
 - (iii) \$2622.62 gross for the period, 1 August 2011 and 30 June 2012.**
- B. There is no order for costs.**

Employment Relationship Problem

[1] Emma Johnston was employed by East City Towing & Salvage Limited (East City Towing) from 30 March 2008 to 1 July 2012. She appears not to have been provided with an employment agreement.

[2] At various stages during her employment with East City Towing, Ms Johnston and Mr Holliday, director of East City Towing were involved in a personal relationship. While extensively disclosed by both parties to the Authority, it was not necessary to recount the details of this relationship to resolve Ms Johnson's employment relationship problem.

[3] Ms Johnston undertook a period of parental leave from 2011 but claims that she continued to perform some duties for East City Towing during that period. Regardless of whether she performed any duties, she would have continued to be entitled to four weeks annual leave.¹

[4] Ms Johnston lodged a statement of problem with the Authority on 22 November 2015, alleging a personal grievance and claiming unpaid holiday pay and other monies. East City Towing lodged a statement in reply on 16 December 2015, which denied all of Ms Johnston's claims.

[5] Upon review of Ms Johnston's statement of problem and the other information provided with it, there was no material before the Authority that showed that Ms Johnston raised a personal grievance within 90 days of the unjustified action (or actions) she alleged occurred to her disadvantage in her employment with East City Towing.²

[6] Furthermore, if a personal grievance was raised within 90 days, the Employment Relations Act 2000 (the Act) required that the personal grievance claim be commenced in the Authority within three years of the date it was first raised.³ It was unlikely, therefore, given the length of time that had elapsed since the end of Ms Johnston's employment that even if Ms Johnston had raised a personal grievance with East City Towing within 90 days, it was lodged with the Authority within the statutory timeframe.

¹ Holidays Act 2003, s 16(2)(ii).

² Employment Relations Act 2000, s 114(1).

³ Employment Relations Act 2000, s 114(6).

[7] In a Member's Minute issued to the parties on 18 December 2015, Ms Johnson was asked to provide comment on this issue.

[8] In response, Ms Johnston advised the Authority on 5 January 2016 that she did not wish to pursue her personal grievance against East City Towing.

[9] Ms Johnston's claim for unpaid holiday pay was lodged within the statutory timeframe. Under s 142 of the Act, Ms Johnston could claim unpaid holiday pay for a period 6 years prior to the lodgement of her statement of problem. The material period for the claim was, therefore, 22 November 2009 (being 6 years prior to filing her claim with the Authority) until 1 July 2012 (being her last day of employment).⁴

[10] I directed East City Towing to provide Johnston's wages and time records covering this material period by 23 December 2015. East City Towing eventually provided some records for Ms Johnson on 18 January 2016.

[11] Ms Johnston was asked to calculate her claim against East City Towing for unpaid holiday pay. She provided this on 5 January 2016.

[12] East City Towing was given an opportunity to respond to Ms Johnston's quantified claim for unpaid holiday pay. Mr Holliday disputed the amount claimed.

[13] Ms Johnston also claimed payment for other monies. Upon review of her statement of problem, it was not entirely clear to what extent, if at all, these monies related to her employment with East City Towing.

[14] Despite this reservation, Ms Johnston was asked to calculate her claims for other monies. These claims had the same material period as her claim for unpaid holiday pay. Mr Holliday disputed all of these claims.

[15] I determined Ms Johnston's claims for unpaid holiday pay and other monies on the papers under s 174D of the Act.

⁴ See, *Victoria Law and Ors v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [80].

Issues

[16] The issues for determination were:

- (i) did East City Towing owe Ms Johnston unpaid holiday pay; and/or
- (ii) did East City Towing owe Ms Johnston other monies arising out of her employment?

Claim for unpaid holiday pay

[17] The records provided by Mr Holliday for Ms Johnston cover the period April 2008 until February 2011. He did not provide records covering the period of employment from March 2011 until July 2012.

[18] Mr Holliday claimed that on 27 November 2011, in response to the calculations contained in the records provided, he gave \$5000 cash to Ms Johnston to settle her claim for unpaid holiday pay.

[19] Ms Johnston agreed Ms Holliday had given her “some money” at the end of 2011 but said this was reimbursement for other monies owed and had nothing to do with holiday pay, as she was still working for East City Towing. Ms Johnston also said that as she was paid through the Inland Revenue Department’s PAYE system, her holiday pay would have been paid the same way.

[20] Ms Johnston claimed \$7847.40 net in unpaid holiday pay from East City Towing. She did not provide a method for arriving at this sum.

[21] Using the records provided by Mr Holliday, Ms Johnston worked 40 hours per week and accrued 1.66 days annual leave per month. On this basis, I have calculated her claim for holiday pay for the period 22 November 2009 until 28 February 2011 as follows:

- (i) For the period 22 November 2009 until 30 November 2009: 13.2 hours
 $\div 160 \text{ hours} \times 72 \text{ hours} \times \$17.88 = \$106.20 \text{ gross.}$
- (ii) For the period 1 December 2009 until 28 February 2011: 13.2 hours x
 $\$17.88 \times 15 = \3540.24 gross.

[22] These figures give a total sum of \$3646.44 gross.

[23] For the period 1 March 2011 until 30 June 2012, Mr Holliday did not provide any records for Ms Johnston. During this period Ms Johnston's pay-rate did not appear to change. However, any amount owed between 1 August 2011 and 30 June 2012 was required to be calculated in accordance with s 42(2) of the Parental Leave and Employment Protection Act 1987.

[24] Ms Johnston's average weekly earnings for the period 12 months immediately to commencing her parental leave were \$715 per week. Taking this amount and multiplying it by four gives a sum of \$2860 gross. Eleven twelfths (91.7%) of that is \$2622.62.

[25] Mr Holliday provided no documentary evidence or information that Ms Johnston had ever been paid holiday pay by East City Towing. It is implausible for Mr Holliday to suggest that a "cash" payment was made to Ms Johnston in November 2011 to settle her claim for unpaid holiday pay, when she was still employed. Such a payment could, should and, most likely, would have been processed through East City Towing's payroll system.

[26] Considering all of the material before the Authority, on the balance of probabilities, Ms Johnston's claim for unpaid holiday pay is made out.

[27] East City Towing must pay the following amounts of unpaid holiday pay to Ms Johnston:

- (i) For the period 22 November 2009 until 28 February 2011: \$3646.44 gross;
- (ii) For the period, 1 March 2011 and 31 July 2011: \$1180.08 gross; and
- (iii) For the period, 1 August 2011 and 30 June 2012: \$2622.62 gross.

Claim for other monies

[28] Ms Johnston's claim other monies included claims for food, mobile and telephone services and costs associated with Mr Holliday's dog, "Jett".

[29] These claims were strongly contested by Mr Holliday. He also claimed that Jett belonged to Ms Johnston.

[30] A number of Ms Johnston's claims appear to have arisen out of the personal relationship between Ms Johnson and Mr Holliday and another, a claim about a mobile phone plan, appears to have arisen after the employment ended on 1 July 2012.

[31] On the information before the Authority, Ms Johnston's claims for other monies, insofar as she asserts they arose out of her employment with East City Towing, are dismissed.

Costs

[32] As Ms Johnston was not represented, there was no order for costs.

Andrew Dallas
Member of the Employment Relations Authority