

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 587  
3051945

BETWEEN                      HARRY LAWRENCE JONES  
Applicant

AND                              RHYTHM MUSIC LIMITED  
Respondent

Member of Authority:        Jenni-Maree Trotman

Representatives:             Applicant in Person  
I-fan Lu, for the Respondent

Investigation Meeting:      10 October 2019

Oral Determination:        10 October 2019

Written Record Issued:     14 October 2019

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Rhythm Music Limited sells and repairs musical instruments. Harry Jones was employed by Rhythm Music in February 2014 as the Store Manager at its Whangarei store.

[2] The parties' relationship was relatively harmonious until 27 March 2018. At this time Mr Jones raised concerns that he had been paid below minimum wage and had not been paid his legal entitlements relating to holiday and sick leave. On 3 April 2018 his employment was terminated by text message.

[3] Mr Jones claims his dismissal was unjustified and claims \$300 as compensation under s 123(1)(c)(i) of the Employment Relations Act (the Act). He further claims wage arrears. Rhythm Music denies Mr Jones' claims.

## **The process**

[4] There was no appearance for or on behalf of Rhythm Music at the investigation meeting. This was despite waiting 30 minutes to commence my investigation.

[5] I am satisfied that Rhythm Music was aware of the investigation meeting. It had received the notice of investigation meeting and had been reminded by email of the meeting by the Authority Officer. For whatever reason, it has elected not to appear and be heard.

[6] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Rhythm Music had duly attended or been represented.

[7] Mr Jones attended and swore on oath that his evidence was true and correct.

[8] As permitted by s 174E of the Act, this determination has not recorded all the evidence received 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.

## **Issues**

[9] The issues to be determined are:

- a. Was Mr Jones unjustifiably dismissed?
- b. If Mr Jones was unjustifiably dismissed, what remedies should be awarded?
- c. If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Jones that contributed to the situation giving rise to his grievance?
- d. Are any wage arrears owing to Mr Jones arising from the non-payment of sick leave, holiday pay, statutory holidays and minimum wage?
- e. Should either party contribute to the costs of representation of the other party?

### **Issue One: Was Mr Jones unjustifiably dismissed?**

[2] There is no dispute that Mr Jones was dismissed. The onus falls upon Rhythm Music to prove that its actions in dismissing Mr Jones were justified.

[3] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Rhythm Music'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 or action occurred.

[4] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Rhythm Music sufficiently investigated the allegations, raised the concerns with Mr Jones, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[5] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Jones being treated unfairly.<sup>1</sup>

*Was the decision to terminate justified?*

[6] I find the process leading to Mr Jones' dismissal on 3 April 2018 was defective. Rhythm Music did not meet any of the mandatory considerations set out in s 103A (3). There was no investigation before dismissal and it did not raise any concerns with Mr Jones before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of the explanation before dismissal. In effect, the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Jones being treated unfairly.

[7] I find the actions of Rhythm Music, and how it acted, were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Mr Jones has a personal grievance that he was unjustifiably dismissed from his employment with Rhythm Music and is entitled to remedies.

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<sup>1</sup> Employment Relations Act 2000, s 103A(5) .

## **Issue Two: Remedies**

[8] Mr Jones claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i). He claims a sum of \$300 as compensation.

[9] Having heard from Mr Jones I am satisfied that he has proven, on the balance of probabilities, that he has suffered humiliation, loss of dignity and injury to his feelings in the sum sought.

[10] Rhythm Music is ordered to make payment to Mr Jones the sum of \$300 under s 123(1)(c)(i) of the Act. Payment must be made within 14 days of the date of this determination.

## **Issue Three: Contributory Conduct**

[11] As I have determined that Mr Jones has a personal grievance, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, I must consider the extent to which his actions contributed towards the situation that gave rise to the personal grievance. If those actions so require, I must then reduce the remedies that would otherwise have been awarded.<sup>2</sup>

[12] I am satisfied there was no blameworthy conduct by Mr Jones that contributed to the situation giving rise to his personal grievance.

## **Issue Four: Wage Arrears**

### ***Payment for Public Holidays not worked***

[13] Section 49 of the Holidays Act 2003 provides that where an employee does not work on a public holiday but that day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

[14] Having reviewed the wage records provided for 2014 and 2015 I am satisfied that the following public holidays were days that would otherwise have been a working day for Mr Jones:

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<sup>2</sup> Employment Relations Act 2000, s 124.

- a. During 2014: Good Friday, Easter Monday, Anzac Day, Queens Birthday, Labour Day, Christmas Day, Boxing Day.
- b. During 2015: 1 and 2 January, Auckland Anniversary Day, Waitangi Day, Good Friday, Easter Monday, Anzac Day, Labour Day, Christmas Day, Boxing Day.

[15] No wage records were provided by Rhythm Music for 2016 however Mr Jones told me that he worked every Tuesday to Saturday or Wednesday to Saturday each week. In light of this evidence I am satisfied that Good Friday, Christmas Day and Boxing Day were days that would otherwise have been a working day for Mr Jones during this period.

[16] Rhythm Music provided the wage records for the period from 1 April 2017 to 31 December 2017 that showed the hours of work that Mr Jones worked each week. A comparison of these hours with the payslips provided to me by Mr Jones showed some discrepancies. However, I am satisfied that no public holiday fell on a day that would ordinarily have been a working day for Mr Jones during that period for which he was not paid.

[17] No wage records were provided by Rhythm Music for the period 1 January 2017 to 31 March 2017. However Mr Jones told me that during this period he worked every Thursday to Saturday. I am satisfied that no public holidays fell on days that would otherwise have been a working day for Mr Jones during this period.

#### *Calculation of entitlements*

[18] To calculate Mr Jones' average daily pay I have used the formula set out in s 9A of the Holidays Act 2003.

[19] Although Rhythm Music provided a summary of Mr Jones' wage records showing the number of hours worked each week during the 52 weeks prior to the ending of his employment, it did not produce his payslips. Mr Jones was able to locate some payslips. These showed discrepancies with some of the days and hours stated in the summary provided to me by Rhythm Music. Mr Jones was unable to produce his bank statements to assist the Authority and his IRD Income Earnings do not disclose any income during this period.

[20] In the circumstances, taking into account the discrepancies between Rhythm Music's summary, and the payslips provided by Mr Jones, I have calculated the number of hours worked by Mr Jones during the 52 weeks prior to the ending of his employment to be 619 hours. During this period Mr Jones was paid less than minimum wage. Using the minimum wage applicable at the time (\$15.75) and multiplying this by the number of hours worked I reach a figure of \$9,749.25.

[21] Dividing Mr Jones' earnings by the number of days on which he earned those earnings (82 days), I reach an average daily pay of \$118.90.

[22] Multiplying Mr Jones' average daily pay of \$118.90 by the total public holidays (20) comes to a sum of \$2,378. A sum of \$190.24 representing 8% holiday pay must be added to this sum making a total of \$2,568.24.

[23] Rhythm Music is ordered to pay Mr Jones the sum of \$2,568.24 under s 49 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

***Payment for annual leave due on termination***

[24] Pursuant to s 24 of the Holidays Act if an employee's employment comes to an end, and the employee is entitled to annual holidays and has not taken those holidays, or only some of them, the employer must pay the employee for the portion of the annual holidays not taken.

***Was Mr Jones paid annual leave?***

[25] Mr Jones claimed that he was not paid annual leave for the duration of his employment. Rhythm Music maintained that it paid him holiday leave during 2014 and 2015 but then came to a separate arrangement relating to future years.

[26] By minute dated 9 July 2019 Rhythm Music was directed to provide Mr Jones' annual leave records. It failed to do so despite being reminded of this direction by the Authority on a number of occasions.

[27] In the absence of annual leave records I reviewed the wage records provided by Rhythm Music. These do not show any payment of annual leave. In the circumstances I find, on balance, that Mr Jones was not paid annual leave for the duration of his employment.

### *Calculation of entitlements*

[28] Annual leave is to be calculated using the greater of either an employee's ordinary weekly pay as at the date of the end of employment or their average weekly earnings during the 12 months immediately before the end of the last pay period before the end of an employee's employment.<sup>3</sup>

[29] The greater in this case is the second of these options. Mr Jones' average weekly earnings during the 12 months immediately before his termination were \$221.57.

[30] For the period from 4 February 2014 to 3 February 2018 there were 4 years. Mr Jones was entitled to 4 weeks' pay for each of those years making a total entitlement of 16 weeks. Multiplying 16 weeks by \$221.57 I reach a figure of \$3,545.12.

[31] For the period 4 February 2018 to 3 April 2018 it is appropriate that holiday pay is calculated at the rate of 8%.<sup>4</sup> During this period Mr Jones worked 74 hours. Multiplying these hours by \$15.75 per hour I reach a figure of \$1,165.50 for earnings.

### *Findings*

[32] Rhythm Music Limited is ordered to pay Mr Jones the combined sum of \$4,710.62 for outstanding holiday pay due for the period 3 February 2014 to 3 April 2018 within 14 days of the date of this determination.

### *Sick leave entitlements*

[33] An employee is entitled to sick leave in accordance with the provisions of the Holidays Act. An employee may carry over up to 15 days' sick leave to a maximum of 20 days' current entitlement in any year.<sup>5</sup>

[34] The Statement of Problem pleads that Mr Jones was not paid his sick leave entitlements. Mr Jones was able to point to two periods where he took sick leave but was not paid. Namely, the period from 18/06/17 to 9/07/17 and on 3, 9 and 10 March

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<sup>3</sup> Holidays Act 2003, s 24(2).

<sup>4</sup> Holidays Act 2003, s 25.

<sup>5</sup> Holidays Act 2003, s 65-68.

2018. His absence from work was shown on the payslips provided to the Authority that also show he received no payment.

[35] During these periods the wage records show Mr Jones ordinarily worked on Fridays (8 hours) and Saturdays (7.5 hours). Taking into account his accrued sick leave entitlements he was entitled to be paid for 4 Fridays (32 hours) and 5 Saturdays (37.5 hours). Using the minimum wage of \$15.75 and multiplying this by 69.5 hours I reach a figure of \$1,094.62.

#### *Findings*

[36] Rhythm Music is ordered to pay Mr Jones the sum of \$1,094.62 for outstanding sick leave entitlements within 14 days of the date of this determination.

#### ***Minimum wage***

[37] The Statement of Problem pleads that Mr Jones was not “paid the minimum wage over large blocks of time”. During the course of the investigation Mr Jones advised me that he was referring to the period from 1 April 2017 to 1 April 2018 when the minimum wage increased to \$15.75. He said that during this period he was only paid \$15.50 per hour. His evidence was supported by the payslips he provided to the Authority.

[38] I find there has been a breach of the Minimum Wage Act 1983. Mr Jones was paid only \$15.50 for the period from 1 April 2017 to 1 April 2018 being 25 cents per hour less than minimum wage. Multiplying the hours he worked during this period (619 hours) by 25 cents per hour I reach a figure of \$154.75. To this I add 8% holiday pay (\$12.38).

#### *Findings*

[39] Rhythm Music Limited is ordered to pay Mr Jones the combined sum of \$167.13 within 14 days of the date of this determination.

#### **Issue Nine: Costs**

[40] Mr Jones was not represented and therefore does not claim legal costs. However he has paid the Authority’s filing fee of \$71.56. This fee is an amount reasonably recoverable from Rhythm Music.

[41] I order Rhythm Music to pay the sum of \$71.56 to Mr Jones within 14 days of the date of this determination.

### **Outcome**

[42] The overall outcome is:

- a. Harry Jones was unjustifiably dismissed.
- b. Rhythm Music Limited is ordered to pay to Harry Jones the following amounts within 14 days of the date of this determination:
  - i. \$300 under s 123(1)(c)(i) of the Employment Relations Act 2000;
  - ii. \$8,540.61 under s 131 of the Employment Relations Act 2000
  - iii. \$71.56 being the Authority's filing fee.

### **Certificate of Determination**

[43] I direct, pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, that Mr Jones be provided with a certificate of determination, sealed with the seal of the Authority. This certificate is to record that, within 14 days of the date of this determination, Rhythm Music Limited is ordered to pay the following amounts to Mr Jones:

- i. \$300 under s 123(1)(c)(i) of the Employment Relations Act 2000;
- ii. \$8,540.61 under s 131 of the Employment Relations Act 2000
- iii. \$71.56 being the Authority's filing fee.

Jenni-Maree Trotman  
Member of the Employment Relations Authority