

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 369
3050192

BETWEEN LISA KHAN
 Applicant

AND SAIL CONNECTIONS (2010)
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Matthew McGoldrick, counsel for the Applicant
 Richard Mark, counsel for the Respondent

Investigation Meeting: 6 May 2019

Submissions Received: 6 May 2019 from the Applicant
 6 May 2019 from the Respondent

Date of Determination: 26 June 2019

DETERMINATION OF THE AUTHORITY

- A. The employment of Ms Lisa Khan by Sail Connections (2010) Limited (Sail) ended by constructive dismissal which was unjustified.**
- B. In settlement of her personal grievance for unjustified constructive dismissal, within 28 days from the date of this determination, Sail must pay Ms Khan the following sums:**
- (i) \$23,000 under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act) as compensation for humiliation, loss of dignity and injury to feelings;**
 - (ii) \$11,405.72 gross in wages lost under s123 (1)(b) of the Act.**
- C. Within 28 days of the date of this determination, Sail must pay Ms Khan \$16,859.31 gross for unpaid holiday pay due to her upon termination of her**

employment together with interest at the rate of 5% per annum from 22 September 2017 until payment.

D. Costs are reserved.

Employment Relationship Problem

[1] Ms Khan was employed by Sail for just over ten years. Ms Khan says an ongoing dispute arose about her holiday entitlements, it was not resolved and her employment relationship suffered as a result. Ms Khan says she was forced to resign. She claims this amounted to an unjustified constructive dismissal for which she seeks remedies under the Employment Relations Act 2000 (the Act). Ms Khan says Sail owes her unpaid holiday pay.

[2] Sail says that Ms Khan was in a “sole charge” position. Her duties included keeping employment records, including her own leave records. Sail says that during the course of her employment, Ms Khan took lengthy holidays in Europe and did not record these periods as holidays. Following one European trip, the director of Sail, Mr Robert Cross, attempted to clarify Ms Khan’s leave entitlements with her. No agreement was reached about Ms Khan’s holiday leave entitlements. Mr Cross says Ms Khan took leave during her employment by Sail and has no claim for unpaid leave.

[3] Mr Cross says Ms Khan decided to resign, she was not forced to. Mr Cross denies Ms Khan has a claim of unjustified constructive dismissal against Sail.

The Authority’s investigation

[4] Ms Khan and her partner, Mr Dean Wallis, each filed a written witness statement for the Authority’s investigation. For Sail, Mr Robert Cross, Ms Sue Assad, current employee of Sail, Ms Sharon Hansard, Mr Cross’s partner, and Mr Neil McCall, a friend of Mr Cross, each filed witness statements.

[5] Each of the witnesses swore on oath or affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[6] The parties also had an opportunity to provide closing submissions on the issues for determination, which they did at the conclusion of the investigation meeting.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination by the Authority are:

- (a) Was Ms Khan's resignation caused by Sail breaching her terms of employment and duties owed to her as an employee, so that her resignation was in fact a constructive dismissal?
- (b) If Ms Khan was constructively dismissed, what remedies should be awarded to her?
- (c) If any remedies are awarded, should they be reduced due to any actions by Ms Khan that contributed to the situation giving rise to her grievance?
- (d) Is Ms Khan owed holiday pay? If so, what amounts are owed to her?

First Issue

Was Ms Khan's resignation caused by Sail breaching her terms of employment and duties owed to her as an employee, so that her resignation was in fact a constructive dismissal?

[9] A resignation may be held to amount to a constructive dismissal where an employer's breach of duty or a term of employment has caused an employee to resign. The breach must be serious enough to make it reasonably foreseeable that the employee felt compelled to resign rather than remaining in employment. In such a case, the resignation is not really at the initiative of the employee, rather it is a resignation as a result of the unjustified actions of the employer. The resignation is deemed at law to be a constructive dismissal.¹

[10] In cases of constructive dismissal, the onus is on the employee to establish that he or she resigned because of a breach of duty or a breach of his or her employment agreement by the employer. Further, that the breach of duty was so serious to make it reasonably

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* [1994] 1 ERNZ 168 at 172.

foreseeable by the employer that the employee would not be prepared to continue to work under such conditions.

[11] The Authority determines such matters on the balance of probabilities, that is its assessment of what is more likely than not to have been the case.

[12] Ms Khan's claim of constructive dismissal is on the basis that Sail and Mr Cross treated her unfairly and unreasonably by:

- (a) Requiring her to agree that no holidays were owing to her before 31 March 2016;
- (b) Attempting to change her terms of employment without fair consultation;
- (c) Informing Ms Khan that the "outstanding leave entitlement" issue was a condition of a new employment agreement being put in place;
- (d) When agreement could not be reached, failing to honour Ms Khan's holiday and leave entitlements.
- (e) Mr Cross making statements in an angry manner which Ms Khan took to mean Mr Cross no longer wished Sail to be bound by an employment agreement with her.

Sail's response

[13] Mr Cross denies the claims and says he was trying to obtain some certainty around Ms Khan's claims to holidays. Mr Cross also wished to negotiate a new employment agreement with Ms Khan which was more reflective of the employment relationship which had developed between them. He was surprised by Ms Khan's resistance. Ms Khan's decision to resign was hers, it was not forced upon her.

Purchase of Sail – September 2010

[14] Sail is an international yacht charter company. Mr Robert Cross is the sole director. Mr Cross purchased Sail in September 2010. At the time of the purchase, Ms Khan was employed by the previous owners of Sail. Ms Khan had been employed by Sail's previous owners for just over ten years in the position of Sales Consultant and had built up a great deal of industry knowledge. Her role at Sail was to respond to enquiries from clients and match them with charter boats in various destinations around the world.

[15] Ms Khan's partner, Mr Dean Wallis, and Mr Robert Cross were good friends. Mr Cross became aware of the opportunity to purchase Sail from its previous owners in 2010, and following negotiations, did so.

Ms Khan's employment agreement

[16] Following the purchase of the business, Mr Cross gave Ms Khan a written employment agreement. The agreement was signed by the parties on 30 August 2018, with effect from 1 September 2010.

Hours of work and holidays

[17] Ms Khan was employed as Charter Manager. Ms Khan's hours of work were stipulated in the employment agreement as follows:

The hours of work required for this position are determined by the expected outcomes of Sail Connections Limited and their clients as per the job description. This position is seen as full time (40 hours per week) with some of those hours required to work away from the office to balance the home life of the Employee and manage communication in different time zones.

[18] The job description attached to the employment agreement set out Ms Khan's duties including that the role was to provide a high standard of assistance to the company director and a requirement to undertake general office duties including keeping the office premises "secure, tidy, attractive and presentable to clients, manage reception, correspondence, courier, and banking processes and practices ...".

[19] Ms Khan was paid a salary which was direct credited into her bank account on a weekly basis. The amount did not alter during the course of her employment.

[20] When Ms Khan began her period of employment following Sail's purchase of the business, her holidays were paid out and not carried forward. Holidays were the usual four weeks for each year of completed employment, in accordance with the Holidays Act 2003 (Holidays Act). The employment agreement did state that:

The accumulation of annual leave will be reviewed from time to time with the intention of minimal days owing to be carried forward. A limited amount of leave may be accumulated until a later date for a specified purpose, by agreement with Sail Connections.

[21] Clause 9.2 of the employment agreement states that Sail may implement a close-down period once every 12 months to meet market and business needs and that the employee would be required to take leave during that period.

Ms Khan's employment by Sail

[22] Ms Khan was very experienced within the charter yacht industry, having been employed for over 10 years by the previous owner of Sail and before that for more than ten years with another yacht charter company.

[23] Mr Cross, on the other hand, was inexperienced when Sail purchased the business. At the outset, Mr Cross relied heavily on Ms Khan and her experience. Ms Khan says it was never a requirement of her employment by Sail that she keep employment records or that she keep her own holiday records. Ms Khan says that as the owner of Sail, this was Mr Cross's responsibility.

[24] The parties agree that during the course of Ms Khan's employment, the yacht charter business developed from being one based in an office in Auckland, New Zealand, to a more remote, mobile business. This was largely driven by the need to service clients in destinations in different time zones throughout the world.

[25] Ms Khan says that when she took holidays, sometimes she took holidays which were uninterrupted. However, often when she was in Europe during the busy holiday period in June and July, she would work as normal for a significant period of time and would take a separate holiday during which she would not work. Ms Khan says her work included emailing, organising and communicating with clients. Ms Khan considered that she was able to operate at such times, in a similar manner as when based in Auckland. This was because she was simply in a different time zone working from her laptop communicating with clients as she did in Auckland. This method of operation, Ms Khan says, worked well for her, Mr Cross and Sail's customers.

[26] Ms Khan's partner, Dean, confirmed to the Authority that when he and Ms Khan travelled overseas, the periods of time that she worked would mean that she would have a laptop set up and would work as she did while in New Zealand.

[27] Mr Cross says that he did not want Ms Khan working when she was supposedly on holiday but because of his close friendship with Ms Khan and her partner Dean, he felt unable to raise the subject with Ms Khan.

Early 2017

[28] Ms Khan says it was in early 2017 that Mr Cross began talking with her about the possibility of a new employment agreement. Discussions were held by phone, sometimes by Skype messaging and sometimes when they caught up face-to-face. Ms Khan says she was confused by the discussions which were not specific. Mr Cross would talk about changing her work arrangements from a salary to an hourly rate, to being a contractor, and being paid a profit share. Ms Khan says she found the discussions uncomfortable because no concrete proposal was being put to her by Mr Cross. Ms Khan says that she found the discussions caused her to become anxious and frustrated.

June 2017

[29] Ms Khan says that she and her partner, Dean, had booked flights to the United Kingdom (UK) for a three week holiday in Greece with their son. When she broached the subject with Mr Cross, he said that she could take the holiday but she would be expected to work each day while in the UK, then she could have a “non-contact holiday” while in Greece.

[30] Ms Khan travelled with her family to the UK on 5 June 2017 and was due to return to New Zealand on 11 July 2017. Ms Khan’s intention was that for the period from 5 June until approximately 12 June 2017, she would continue to work as she always did when in the UK, remotely. From 12 June to 26 June 2017, she would be in Greece on holiday and would not undertake any work for Sail. When she returned to the UK on 29 June 2017 until she left for New Zealand on 11 July 2017, she would work remotely as usual.

[31] Just before her trip to the UK, Ms Khan received a lengthy email from Mr Cross, setting out what his expectations were with regard to her “holiday” in Europe. While raising this subject in the email, Mr Cross also stated:

I anticipate formalising a revised employment contract shortly after you return from Europe. This letter serves to formalise how this four week period will be treated with respect to holidays. The first 2 weeks will involve checking and replying to my question email daily. For the second 2 weeks no attendance to the business of Sail Connections is required. With respect to the legal requirement of 4 weeks per year, 2 weeks of non-attendance is to be

treated as 2 weeks holiday. The 2 weeks where partial attendance is required will be deducted from the 3 week annual leave for partial attendance weeks as discussed and agreed. This effectively offers 5 weeks of holiday.

...

We need to both agree that there are no holidays owing before 31st March 2016.

...

Going forward you will email leave applications and we will agree which one will be partial or non-attendance weeks as defined in the new agreement yet to be written.

...

This letter serves as an agreement to tidy up previous and current holiday periods. The new employment contract we are to enter into later this year may or may not follow this format.

[32] Ms Khan responded to the email on 5 June 2017 stating that she could not agree to anything in the “discussion document” other than as set out in her email. Ms Khan stated that she did not believe it to be fair or reasonable to expect her to agree to Mr Cross’s proposal within the timeframe stipulated. Ms Khan stated that she may need some external advice before reaching an agreement.

[33] In her response to Mr Cross, Ms Khan agreed that for the period 6 June 2017 until 12 June 2017 she would work in the UK as usual and did not expect this to be treated as leave. For the period 12 June 2017 until 26 June 2017 she would be totally absent and on leave. For the period from 29 June until 11 July 2017 she would resume the work arrangement while in the UK and would not expect that period to be treated as holidays.

[34] Mr Cross was not happy with Ms Khan’s response and responded in an email on the same day. Mr Cross informed Ms Khan that she had too much leave accumulated and that he needed her to treat the four week period in Europe as leave. The email concluded by stating: “This needs to be agreed on or I will be forced to put something in place”.

Engagement of Human Resources (HR) Advisor

[35] Upon Ms Khan’s return from the trip to the UK, Mr Cross wished to progress discussions about a new employment agreement and to tidy up Ms Khan’s holidays. Ms Khan decided that she was finding it too difficult to communicate directly with Mr Cross and that she would need an independent HR advisor to assist. This was partly due to the close personal relationship that she and her partner, Dean, had with Mr Cross. It seems that

Mr Cross also had difficulties communicating with Ms Khan because of the friendship. Mr Cross said on a number of occasions at the Authority's investigation meeting that he found it difficult to communicate with Ms Khan in a direct manner because of their friendship.

[36] On 25 August 2017, Ms Khan sent an email to Mr Cross informing him that she had engaged an HR consultant to assist her and that she would be in contact with him directly. Mr Cross's response was abrupt. In an email a couple of hours after receiving Ms Khan's advice that she was consulting with an HR person, he sent an email stating that he was concerned that she would engage—

“someone to throw legislation at me when we have both been aware for some time that your existing contract is totally irrelevant to the role you now fulfil.

...

I have dealt with many HR people in my time and they are all of the same ilk. It's best you let me know how you are paying this HR person as I do not want her to make a meal out of this. I must say I am disappointed in you not feeling you can discuss this with me.

...

I just hope this person does not piss me off too much. If she does I too will have to engage an HR person and then it gets ridiculous.

Events leading to resignation

[37] There were a number of communications between Mr Cross and Ms Khan's HR consultant and a number of meetings. However, the parties were unable to resolve issues between themselves. Ms Khan says that Mr Cross became increasingly confrontational and aggressive with her and with her HR consultant. It is clear from the email communication that Mr Cross felt hurt by Ms Khan seeking external advice and her inability to deal with him directly. It is evident from the communications that Mr Cross felt that he had dealt more than fairly with Ms Khan to enable her to take holidays in Europe. While Ms Khan may have been doing some work while in Europe, Mr Cross was of the view it was not continuous work.

[38] Ms Khan says that the ongoing confrontational correspondence between Mr Cross and her HR consultant spilt over into her working relationship with Mr Cross. Ms Khan says she became increasingly anxious during the course of the discussions over her employment agreement and holidays. She says she was often in tears and was finding it difficult to work

effectively. Ms Khan says because Mr Cross had kept no holiday records, she was trying her best to piece together her holidays over a number of years so that there could be resolution.

Events leading to Ms Khan's resignation

[39] Ms Khan decided that she could not continue working for Sail. She felt under an "avalanche of pressure". Mr Cross was pressurising Ms Khan to agree to having zero holiday entitlements and was proposing different working arrangements to her. Such working arrangements included the possibility of being a casual employee or working on a commission only basis. Mr Cross also threatened Ms Khan that if an agreement could not be reached with regard to her holidays and other entitlements, he would put something in place. This behaviour was evidenced by contemporaneous emails and correspondence made available to the Authority. On 11 September 2017, Ms Khan sent an email to Mr Cross, giving her notice of resignation. The resignation gave a lengthy period of notice. Ms Khan says that she wanted to give Mr Cross a long period of notice so that she could do a full handover.

[40] Following receipt of Ms Khan's resignation on 11 September 2017, Mr Cross's reaction was one of surprise but also appeared positive. Mr Cross wrote to Ms Khan in an email on 11 September 2017 at 6:18:13 suggesting that it would be ideal if she could train a new person to take on her role and he could offer her a "contract rate to do this". The email then states: "This of course does not affect the settlement of holiday pay owing and I fully intend to settle on this".

18 September 2017

[41] On the morning of 18 September 2017, Mr Cross phoned Ms Khan on his way to consult with his HR advisor. Ms Khan's partner, Dean, was present during the course of the telephone conversation. Ms Khan says that Mr Cross began shouting at her and challenging the number of holidays that she claimed were owing to her. He told Ms Khan that he did not know "how we can continue to work together". Ms Khan was so upset by the way in which Mr Cross was speaking to her, she intended to hang the phone up but did not. Mr Wallis confirmed that he could hear Mr Cross when he was speaking to Ms Khan on the phone and that he was "going off". Ms Khan says she felt "ripped apart" following the telephone call and Mr Wallis confirmed that Ms Khan was "a mess" following the phone call. Ms Khan

felt that she was unable to continue to work for Mr Cross and that he did not want her to continue working through to December.

[42] A couple of hours following the phone call, Ms Khan received a lengthy email from Mr Cross. The first sentence of the email states: “I am just working through this. Are you saying you did not take any holidays in 2012, 2013, 2014? Lisa that is an incredible claim!” Ms Khan’s response was to acknowledge that they did not agree on the total holidays and that she felt she was being reasonable. She agreed that some impartial advice was necessary.

[43] Mr Cross’s response was to ask Ms Khan to account for holidays “for the missing years mentioned, it’s ludicrous to say you did not have any holidays and never complained”.

Resignation

[44] The following day, on 19 September 2017, Ms Khan responded as follows:

Hi Rob. It is clear from our conversation this morning that you don’t want me working for Sail Connections. I am exhausted from the constant threats and bullying tactics and withdraw my offer of working through to 22 December and now Friday 22 September will be my last day. I feel I have done everything possible to represent Sail Connections to the best of my ability and I am very upset and disappointed that it has ended like this after such a long time.

I recently spent days, if not weeks, trying to supply my holiday records in order to resolve the problem of my outstanding leave. The response to my efforts is to try and pick this apart, rather than supply the required records. I now feel that my hard work trying to grow Sail Connections over the past seven years has not been appreciated. This time has included long periods of carrying the entire workload of the business while making my own arrangements for places to work – and paying the costs for doing so.

I will leave the sales enquiries and help ensure files are up to date as far as possible and the Booking Schedule shared doc is complete.

In my last few days at Sail Connections I would appreciate it if you could maintain a reasonably professional standard of communication.

Lisa

[45] Mr Cross responded on 20 September 2017:

Hi Lisa,

I will respond to your last email after I have spoken to my HR “consultant”.

It's a shame this has gone this way and maybe it's through misunderstanding but I thought I was very clear when I instructed you to take holidays. You obviously believe it was your right not to count them as such and from this we now have an argument.

The only winners are lawyers in these ugly situations and it is something you know I have always done my best to avoid in life. The costs incurred will surely exceed the difference we are arguing over. I hope your HR person has given you a clear indication of what you are entering into. You have done a good job for Sail Connections and I am happy to see you leave with a payment. My offer stands until end of mediation, at which stage it is out of our hands.

...

[46] Ms Khan's last day at Sail was 22 September 2017.

[47] It is my view that Ms Khan's resignation amounted to a constructive dismissal which was unjustified. Mr Cross as the owner of Sail was responsible for ensuring his employment records were kept and were up to date. I do not accept that this was a role that Ms Khan was responsible for. Indeed, it does not form part of her job description. It does, however, form part of the job description of her successor, Ms Sue Assard. Ms Assard's job description includes maintaining a register of all approved leave taken and regularly updating the owner. Ms Assard's role also has obligations with regard to the keeping of other employment records.

[48] Mr Cross failed to keep clear holiday records and to have a clear arrangement with Ms Khan as to what his expectations were in relation to her working overseas. As an owner and an employer, this was Mr Cross's duty and obligation. Mr Cross then demanded that Ms Khan agree that a line be drawn under her leave and that her entitlement be set at zero. When Ms Khan tried to discuss her leave entitlement and engage with Mr Cross, he became confrontational and aggressive. This was very distressing for Ms Khan who felt under constant stress. I consider Ms Cross's actions amounted to a serious breach of Ms Khan's employment with Sail and her subsequent resignation was foreseeable.

Issue two: If Ms Khan was constructively dismissed, what remedies should be awarded to her?

[49] Ms Khan gave extensive evidence about the events leading up to her resignation and the impact her resignation had on her.

[50] Ms Khan says that Sail had played a significant part in her life and that she and Mr Cross had had a good working relationship and a friendship up until the events that led to her resignation. She says that following her resignation she was left “feeling a mess” and unable to sleep or eat. She suffered from anxiety attacks, became increasingly insular and would not socialise. Ms Khan says that the events leading up to her resignation and her resignation still have an impact on her. Ms Khan has had to cope by learning strategies to manage her feelings.

[51] Mr Wallis gave evidence of the impact of the events on Ms Khan. He says that he had to support Ms Khan through some very dark days and that he felt at one stage she was suicidal. Mr Wallis says Ms Khan is “incredibly loyal” and was “totally dedicated” to her job at Sail. Dealing with accusations of dishonesty over holidays was very difficult for her.

[52] Mr Cross accepted, when questioned about some of his correspondence, that his language had been “cynical” and that he had been “negotiating dramatically” with Ms Khan rather than calling her a liar. Mr Cross also said that during the course of the seven years he had worked with Ms Khan there had never been a harsh word between them.

[53] I find this statement to be at odds with the contemporaneous documentation provided by Mr Cross, the way in which he reacted to the evidence at the Authority’s investigation and the evidence of Ms Khan and Mr Wallis about the tone of the telephone conversation of 18 September 2018.

[54] In the circumstances, I consider an award of \$23,000 compensation under s 123(1)(c)(i) of the Act, for humiliation loss of dignity and injury to feelings suffered by Ms Khan to be appropriate. Sail is ordered to pay Ms Khan the sum of \$23,000 within 28 days of the date of this determination.

Loss of remuneration

[55] Ms Khan claims lost remuneration for the period between 22 September 2017 being her final day at Sail and 22 December 2017 which is the date that she expected would be her final day. Ms Khan is not seeking lost remuneration for a longer period of time. Ms Khan was unable to continue working her period of notice out because of the way in which Mr Cross’s behaviour towards her escalated. Her integrity was being questioned and Mr Cross’s own evidence was that he could not see how they could continue working

together. I consider Ms Khan's claim to be a reasonable one. Three months' lost remuneration equates to \$12,509.75. Evidence was given about an overpayment to Ms Khan which she accepts, being the amount of \$1,104.03. This amount is to be deducted from the lost remuneration claim. Total lost remuneration therefore amounts to \$11,405.72. I order Sail to pay Ms Khan the sum of \$11,405.72 gross within 28 days of the date of this determination.

Issue three: If any remedies are awarded, should they be reduced to any actions by Ms Khan that contributed to the situation giving rise to her grievance?

[56] I do not consider that Ms Khan contributed to the situation giving rise to her grievance. Ms Khan attempted to engage with Mr Cross across her understanding of her holiday entitlement. In response, Mr Cross continually requested that she agree no holidays were owing to her before 31 March 2016 and became aggressive in his correspondence when Ms Khan engaged an independent HR advisor to assist with the negotiation.

Issue four – is Ms Khan owed holiday pay? If so, what amounts are owed to her?

[57] It is accepted that there has been no holiday pay made to Ms Khan on the termination of her employment on 22 September 2017. It is also accepted that Sail failed to keep and provide access to Ms Khan to her holiday and leave records as required by ss 81 and 82 of the Holidays Act 2003 (the Holidays Act). I accept Ms Khan's statements about her holiday entitlements. This is for two reasons. I prefer her evidence over that of Mr Cross whose evidence was contradictory and unreliable. Further, ss 83(3) and 83(4) of the Holidays Act provides:

83 Failure to keep or provide access to holiday and leave record

...

- (3) If, after hearing the evidence, the Authority is satisfied that the employer failed to comply with section 81 or section 82 and that the failure prevented the claimant from bringing an accurate claim, the Authority may make a finding to that effect.
- (4) If a finding under subsection (3) is made, then the Authority may accept as proved, in the absence of evidence to the contrary, statements made by the employee about—
 - (a) holiday pay or leave pay actually paid to the employee:
 - (b) annual holidays, public holidays, sick leave, bereavement leave, or domestic violence leave actually taken by the employee.

[58] Mr Cross failed to keep holiday records for his company, Sail. This was his responsibility and not Ms Khan's. I accept Ms Khan's evidence that she worked while on holiday. This was accepted by Mr Cross. His argument was that she was not fully working. Ms Khan was entitled to an opportunity for rest and recreation as provided in s 3 of the Holidays Act. This was not afforded to her as she was working at the same time.

[59] Counsel for Ms Khan referred the Authority to the Employment Court decision of *Glenmavis Farm Partnership 2007 v Todd*². In that decision, the Employment Court stated:

[37] The plaintiff's case is that Mr Todd should not be permitted to take advantage of the absence of any or at least adequate records because, it says, he was responsible for their maintenance but failed to do so.

...

[38] I do not accept the plaintiff's contention in this regard for two reasons. First, there was no job description of Mr Todd's particular managerial responsibilities. Although his 2006 employment agreement, which was the only such agreement executed by him and produced at the hearing, spoke of an attached job description, this was absent and was probably never completed. It follows that in the absence of proven agreement by Mr Todd that his responsibilities included these statutory record keeping ones, I am not satisfied that this was his obligation delegated to him specifically by the employer which is required by law to maintain these records. This responsibility remained with the plaintiff as employer.

[60] This is the situation with Ms Khan. Ms Khan's job description did not include the maintenance of employment records by her. As mentioned earlier, the job description of the person who has taken over from Ms Khan includes such a responsibility. I am satisfied that keeping employment records or her own records were not part of Ms Khan's job description.

[61] As the Employment Court observed in *Glenmavis*:

[40] In these circumstances, the plaintiff cannot absolve itself of the responsibility of doing so. If Mr Todd had been deficient in his reporting obligations (and there is only one instance of such a failure by him to complete records which would not have ensured the maintenance of those which are absent in this case), then this was properly a matter for the employer to have taken up with him but it did not do so.

[62] Again, this observation is relevant to Ms Khan's situation. Ms Khan worked for Sail and Mr Cross for seven years. Mr Cross agreed that there was no written instruction to Ms Khan to keep a record of her own holiday entitlements and to keep employment records. The Employment Court continued in *Glenmavis* to state:

² [2012] NZEmpC 137 at [37] to [45].

- [44] It follows that, in respect of holiday records, s 83 of the Holidays Act 2003 is engaged. Subsection (3) provides that if, after hearing evidence, the Authority (or this Court on a challenge) is satisfied that the employer failed to comply with the record keeping requirements of ss 81 or 82 of that Act, and that the failure prevented the claimant from bringing an accurate claim, the Authority (or this Court) may make a finding to that effect. ...
- [45] Section 83(4) then provides that upon the making of such a finding, the Authority (or the Court on challenge) may accept as proved, in the absence of evidence to the contrary, statements made by the employee about the holiday pay or leave pay actually paid to the employee and about annual holidays, public holidays (and other entitlements not in issue in this case) actually taken by the employee. This does not require the Court to find all such statements made by the employee to be credible, but is a rebuttable presumption of correctness.

Holiday entitlement – s 24

[63] Ms Khan was entitled to four weeks holiday under the Holidays Act following her first year of employment, being 1 September 2011. Ms Khan's evidence is that during her entire employment, she took approximately 12 weeks leave. Ms Khan's actual entitlement for her period of employment, being 7 years from 1 September 2011 to 1 September 2017 amounted to 28 weeks leave.

[64] Under s 24 of the Holidays Act, an employer must pay the employee any entitlement upon termination of employment. My calculations, after deduction of leave taken, Ms Khan is owed 16 weeks holiday pay. Ms Khan's annual salary was \$50,039 gross per annum. This amounts to \$962.29 gross per week. Sixteen weeks at this rate amounts to \$15,396.63 gross holiday pay owing.

Holiday entitlement – s 25

[65] Pursuant to s 25 of the Holidays Act, Sail was required to pay Ms Khan eight per cent of her gross earnings since she last became entitled to annual holidays. Ms Khan's employment ended on 22 September 2017. Her entitlement to holiday pay was on 1 September 2017. Under s 26 of the Holidays Act, "gross earnings" includes payments under s 24 of the Holidays Act. Ms Khan's earnings from 1 September 2017 to 22 September 2017 would have been three weeks, amounting to \$2,886.87 gross. The sum of \$15,396.63 (as above) + \$2,866.87 totals \$18,283.50. In total, Ms Khan's "gross earnings" for the purposes of s25 of the Holidays Act amounts to \$18,283.50. Eight per cent of that amount equals \$1,462.68.

[66] The calculation under ss 24 of the Holidays Act, amount to \$15,396.663 gross. Add to that sum eight per cent of the holiday pay of \$1,462.68 in para [65]. The total amounts to \$16,859.31. Accordingly, Ms Khan is entitled to \$16,859.31 gross in unpaid holiday pay.

[67] I order Sail to pay Ms Khan the sum of \$16,859.31 gross in unpaid holiday pay within 28 days of the date of this determination.

Interest

[68] Ms Khan seeks interest on moneys owed to her pursuant to the Interest on Money Claims Act 2016.

[69] Sail is ordered to pay Ms Khan interest on unpaid holiday pay totalling \$16,859.31 gross from 22 September 2017 until payment, at the rate of 5% per annum.

Anna Fitzgibbon
Member of the Employment Relations Authority