

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 72
5471120

BETWEEN FRANZ KUBESCH
 Applicant

AND THE CABINET PLACE
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Carlos Baumann for the Respondent

Investigation Meeting: 10 March 2015

Determination: 12 March 2015

DETERMINATION OF THE AUTHORITY

- A. Franz Kubesch's employment by The Cabinet Place Limited (CPL) was on a continuous basis, not as a casual or fixed term employee or as an independent contractor.**
- B. CPL's termination of Mr Kubesch's employment on 28 April 2014 was unjustified.**
- C. At the end of his employment CPL owed Mr Kubesch for nine days he worked but was not paid, one public holiday and five days of annual leave.**
- D. CPL must settle Mr Kubesch's personal grievance and wage arrears due by paying him the following sums within 28 days of the date of this determination:**
- (i) \$4536.00 as lost wages under s123(1)(b) of the Employment**

Relations Act 2000 (the Act); and

- (ii) \$5000.00 as compensation under s123(1)(c)(i) of the Act; and**
- (iii) \$2916.00 as wage arrears under s131 of the Act; and**
- (iv) \$126.22 as interest on the wage arrears for the period from 29 April 2014 to 10 March 2015.**

Employment relationship problem

[1] Franz Kubesch was employed by The Cabinet Place Limited (CPL), a joinery manufacture and installation business based in Onehunga, from 20 January 2014 until 28 April 2014. On the latter date he was given a letter bearing the heading “*termination of contractual agreement*”. The letter stated that the job for which he was “*specifically employed*” had “*come to an end and we will no longer require your services as a contractor*”. He was asked to sign the letter to confirm that he had been paid all money owing to him and that he would not make a personal grievance claim.

[2] Mr Kubesch did not sign the letter. In an application to the Authority he claimed he was unjustifiably dismissed and was owed wages arrears. He sought orders for payment of hours and holidays for which he said he was not paid and for lost wages and distress compensation as remedies for his personal grievance.

[3] CPL, in reply, said Mr Kubesch was employed on casual basis to complete a specific project. It provided a copy of an individual employment agreement, said to have been given him at the start of his work, and which described the agreement as “*for a specified period of casual employment*”.

Investigation

[4] In investigating Mr Kubesch’s claim I have considered written and oral evidence from him, his former partner Julia De Ath, CPL’s director Carlos Baumann, CPL’s production manager Sergey Shchechka, CPL’s accountant (and Mr Baumann’s partner) Lucy Korneeva, and CPL’s foreman Raj Sen. Mr Shchechka gave evidence with the assistance of an interpreter of the Russian language.

[5] I also considered a number of documents provided by the parties – including copies of CPL pay records, diary notes Mr Kubesch made about the hours he said he worked, photographs Mr Kubesch took in the CPL workshop and at work sites, text messages exchanged between Mr Kubesch and Ms Korneeva (which they each showed me on their respective mobile telephones), a copy of the employment agreement said to have been given to Mr Kubesch, and the 28 April 2014 letter of termination.

[6] The parties also had the opportunity to ask questions of the witnesses and provide oral submissions on the issues for resolution.

[7] As permitted by section 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions 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.

[8] The issues for resolution were:

- (i) What was the nature of the relationship between Mr Kubesch and CPL – fixed term, casual or ongoing employment or as an independent contractor?
- (ii) If the relationship was one of employment, was its termination decided and carried out in a justified way, that is for reasons and in the way that a fair and reasonable employer could have done in all the circumstances at the time?
- (iii) If CPL's actions were unjustified, what remedies should CPL pay Mr Kubesch, considering his claims for lost wages and distress compensation and whether any reduction of remedies were required for actions by Mr Kubesch contributing to the situation giving rise to his grievance?
- (iv) Did CPL owe Mr Kubesch any money as wages arrears for days worked but not paid and for holidays (one public holiday and five days annual leave), and, if so, what amount was due?
- (v) If wages arrears were due to Mr Kubesch, should interest be paid on the amount due?
- (vi) Should either party contribute to any costs of representation that the other party may have been incurred?

The nature of the relationship

[9] CPL gave conflicting descriptions of the nature of its employment relationship with Mr Kubesch. Its statement in reply to the Authority (dated 11 August 2014) said he was employed “*on a contract basis until a project was completed*”. An email from Mr Baumann accompanying that document stated that Mr Kubesch “*was employed in a casual basis to complete a specific project*”. The letter of termination given to Mr Kubesch on 28 April, also written by Mr Baumann, said CPL no longer required his “*services as a contractor*”.

[10] This blurring of the legal definition or categories of employment – as a casual employee, a fixed term employee or a continuous employee – was also apparent in the employment agreement said to have been given to Mr Kubesch when he started work for CPL on the morning of 20 January 2014. The agreement stated the terms of employment were “*those of a casual employee*”. Under a heading of “*agreement for daily employment*”, it stated the agreement was “*for a specific period of casual employment*”.

[11] Under the heading of Remuneration, the following sentence was added to a clause referring to the “*irregular nature of casual work*”:

“This agreement is only valid until the completion of the specific job performed (sic) in 62 Stanford Park Road”.

[12] The Job Description, included as Schedule A to the agreement, referred to installation and manufacturing of joinery for the Stanford Park project as the “*primary objective*” but under the heading of primary responsibilities also referred to “*other duties requested by management*”.

[13] An hours of work clause, set out in Schedule B of the agreement, stated normal hours were to be between 7am and 4pm Mondays to Friday but that as the Employee was being employed on an as required basis, there were no fixed or minimum hours of work but “*the Employee shall take all reasonable steps to be available when required*”.

[14] The agreement also included a clause with the heading ‘Trial Period (if applicable)’ which referred to a 90 day trial period applying “*to assess and confirm suitability for the position*”. It appeared to rely on the provisions at s67A and 67B of the Act by stating that an employee may not pursue a personal grievance on the grounds of unjustified dismissal if the employer terminated the employment relationship during the trial period. CPL had not raised that clause as a defence to Mr Kubesch’s claim in the Authority.

[15] There was a sharp conflict of evidence over whether or not Mr Kubesch was given a copy of the employment agreement produced in evidence by CPL. He emphatically denied getting it. Ms Korneeva said she had prepared the agreement on Mr Baumann’s instructions – inserting Mr Kubesch’s name, the pay rate, hours and location of work – and, after Mr Baumann had signed it, had given the agreement to Mr Shchechka. Mr Shchechka said he handed the agreement to Mr Kubesch on the morning of 20 January with an instruction to raise any concerns about its contents within seven days. Mr Shchechka said CPL had an enormous amount of work on at the time Mr Kubesch was employed and he “*could have missed something*” but he believed he had given him the agreement and he had told Ms Korneeva that he had done so. Ms Korneeva also said she had twice asked Mr Kubesch to return a signed copy of the agreement. Mr Kubesch emphatically denied Ms Korneeva made that request to him at all.

[16] I was not persuaded by the evidence of any of the witnesses that either of the competing accounts was more likely than not to be true. As the positive obligation to provide an agreement rested with the employer, it also bore the onus of being able to establish more conclusively – that is to the standard of the balance of probabilities – that it had done so.¹ However, even if it were shown that if Mr Kubesch was given the agreement at the time he started work, CPL’s position would not have survived other difficulties arising from application of relevant legal principles to both the contents of the agreement and the facts of what happened during Mr Kubesch’s employment.

¹ Section 63A(2) of the Act.

Casual employment?

[17] CPL's description of Mr Kubesch's employment as casual matched neither its actual expectation of him nor the pattern of work he did in the months from January to April 2014. While there was a dispute about the hours and days he worked after 9 April, CPL's pay records showed he had worked full-time Monday to Friday in the preceding 11 weeks as well as working on eight Saturdays. During that time he had one day off and one other day where there was gap in the company record.

[18] In determining whether a worker's employment is of continuous and indefinite duration or on a casual basis, the Authority must consider the real nature of the relationship and, where that differs from label given to it by one or both parties, substance should prevail over form.² While the nature of the employment relationship may change over time – often gradually or subtly and occurring in day to day conduct – the time of its termination is the relevant time for assessing its nature where an unjustified dismissal is claimed.³

[19] A sufficiently regular and continuous pattern of work makes employment ongoing, not casual.⁴ Someone hired to work specified hours for a definite period or on a particular project until it is completed, is not doing casual work even if the period is short.⁵

[20] Applying those principles to Mr Kubesch's circumstances, and the pattern of hours he was required to work, his employment was plainly not on a casual basis.

Fixed term employment?

[21] An alternative analysis of the arrangement was that Mr Kubesch's employment was for an agreed fixed term. This description of such a prospect was given by the Employment Court in *Rush Security Services v Samoa* in deciding that a

² Section 6 of the Employment Relations Act 2000 (the Act) and *Rush Security Services Limited v Samoa* [2011] NZEmpC 76 at [20] and *Jinkinson v Oceania Gold (NZ) Limited* [2009] ERNZ 225 at [37].

³ *Rush*, above, at [23] and [24].

⁴ *Rush*, above, at 27.

⁵ *Rush*, above, at 28, citing *Roussy v Minister of National Revenue* 87 CLLC 16,044 (FCA, Canada).

worker's employment had started out as casual but had become employment of indefinite duration:⁶

His employment lost its casual nature. It might perhaps have been or become fixed term in nature but that was not how the plaintiff chose to categorise it under s 66 of the Act as it was incumbent on the employer to do if the statutory tests for fixed term employment were met. In the absence of application or compliance with s 66 and having lost its casual nature, the default position, and indeed the real nature of the employment, was of indefinite duration, ongoing or 'permanent'. That analysis of the position on the facts is supported by the approach to such questions by this Court and its predecessors in New Zealand and internationally.

[22] The statutory tests for fixed term employment referred to by the Court allow for an employer and a worker to agree the employment will end at the close of a specified period or at the conclusion of a specified project but the reasons for the employment ending in that way, and the way in which it will end, must be stated in writing in the agreement. The reasons for such a fixed term must be genuine reasons based on reasonable grounds. If the employer has not met the requirements for a written agreement, the worker may elect to treat the fixed term as ineffective for the purpose of ending her or his employment.⁷

[23] The agreement said to have been given to Mr Kubesch did expressly refer to being “*only valid to the completion of the specific job*” but if that was intended to amount to an agreed fixed term, it failed to meet the requirements of s66 of the Act in three ways.

[24] Firstly, the doubt as to whether Mr Kubesch was given the written agreement hindered CPL's ability to establish his agreement to such a term.

[25] Secondly, the agreement (if it were accepted Mr Kubesch was given it and could be taken to have agreed with its terms) did not state the reason for employment ending at the conclusion of the specified project. Neither did it set out the way in which the employment was to end, such as the mechanism by which completion of the project or 'specific job' would be established.

⁶ Above, at [29].

⁷ Section 66 of the Act.

[26] Thirdly, the evidence also disclosed such a fixed term would have been based on a factor that s66(3)(b) of the Act expressly prohibits as a genuine reason for a fixed term: to establish the suitability of the employee for permanent employment. Mr Shchechka's oral evidence to the Authority established that he and Mr Baumann decided to offer Mr Kubesch what they called casual work on the Stanford Park project in order to check his qualifications and proficiency "*before we offered him [a] full-time position*". Mr Baumann confirmed, in his closing summary at the Authority investigation, that Mr Kubesch was told in his job interview that "*it would be a trial period*".

An independent contractor?

[27] Although Mr Baumann wrote the word "*contractor*" in the termination letter, his evidence confirmed CPL intended the relationship throughout to be one of employment. As shown by CPL's pay records, Mr Kubesch was employed as a wage worker, paid PAYE and received a Kiwisaver contribution. His work was controlled by the requirements of CPL to attend at certain hours and places, required his personal service (and not that of some other agent or employee of Mr Kubesch) and he rendered no invoices for his work. Applying the various legal tests under s6 of the Act to those circumstances confirmed the real nature of the relationship with CPL was one of employment.

Ongoing work?

[28] Having determined that employment was, properly analysed, on neither a casual or fixed term basis, the 'default position' (as described by the Court in *Rush*) was that Mr Kubesch's employment was of indefinite duration and ongoing. Such a finding was – as usual for any supposedly 'permanent' worker – subject to the ability of the employer to provide ongoing work and the risk of a position being disestablished on the grounds of redundancy where that was not the case.

[29] Although Mr Baumann, in his oral evidence, referred to Mr Kubesch being on a trial period, no such arrangement was legally effective. The provisions of s67A and 67B of the Act that allow for a 90 day trial period must be strictly complied with to be effective, including by providing a worker with a copy of an intended agreement

containing such a trial provision *before* she or he begins work and then providing the worker with a reasonable opportunity to seek advice about it.⁸ Mr Kubesch was not given the agreement, if at all, until he arrived at CPL's premises on 20 January to start work. And even if a 'trial period' referred to in the employment agreement might be said to amount to a probationary arrangement allowed elsewhere in the Act (under s67), the application of the law relating to unjustified dismissal was not displaced.

The end of the employment

[30] The ability of CPL to decide there was no longer enough work to keep Mr Kubesch employed was not at issue in this case (provided that was genuinely so). Rather, Mr Kubesch's claim concerned whether the reasons CPL decided he was no longer wanted or needed by the business on a regular, continuous basis – and how it did so – were what a fair and reasonable employer could have done in all the circumstances at the time.

[31] The oral evidence of Mr Kubesch and Mr Baumann confirmed there was a discussion between the two men on 17 April in which Mr Baumann referred to the job at Stanford Park Road coming to an end. Mr Baumann contended that was notice to Mr Kubesch, consistent with a reference in the employment agreement to providing one week's notice of its termination and consistent with Mr Kubesch's employment being only for the duration of that specific project. Mr Kubesch contended the reference to the particular *job* ending did not mean his *employment* was finished because he had done some work on other projects and Mr Baumann had also talked about him working on a project in Manukau.

[32] During the 17 April conversation Mr Kubesch had asked whether he would be paid for the Easter public holidays that weekend. That evening Mr Baumann rang him at home to confirm that he would be paid. Mr Kubesch took that call on a speaker phone which resulted in Ms De Ath hearing the conversation and being able to give evidence about it. Mr Baumann confirmed her account that he had told Mr Kubesch during that conversation that he was happy with his work. Ms De Ath said she recalled Mr Baumann saying that he still needed Mr Kubesch as an employee and

⁸ *Blackmore v Honick Properties Limited* [2011] NZEmpC 152 at [64]-[66] and [70].

“would like to put him into the position of project manager” for the Manukau project. Mr Baumann denied saying he still needed Mr Kubesch and said he had referred only to considering him for the Manukau job.

[33] Mr Kubesch worked during the following week – between the Easter Monday holiday and the Anzac Day that fell on the Friday. CPL said he worked only two days in that week but Mr Kubesch said he worked for three days. During one of those work days he was asked to install ‘crown mouldings’ above cabinetry at one of two houses the Stanford Park Road site. It involved use of a specialised mitre saw and lengths of an expensive imported moulding. Mr Shchechka said he and Mr Kubesch met early that day for a *“strategy meeting”* to talk about how to put up the moulding. He had asked Mr Kubesch to wait at the site until he returned later in the day but when he arrived and asked where Mr Kubesch was, he was told Mr Kubesch had *“disappeared”*. He was disappointed Mr Kubesch had completed only a small length of the moulding work, there were gaps in the mitre cuts and the mouldings were measured and cut in such a way that there were excessive, unusable offcuts.

[34] Mr Kubesch said there was a problem with the mitre saw and he had not disappeared but had gone to a dentist appointment about which he had already informed Mr Shchechka.

[35] On the morning of 28 April Mr Baumann talked to Mr Kubesch about the future of his employment with CPL. Mr Kubesch’s account of that discussion was that Mr Baumann asked why he had not finished the crown mouldings and, dissatisfied with his explanation, Mr Baumann said he would not pay him and *“it was over”*. When Mr Kubesch said he wanted to have that in writing Mr Baumann wrote the termination letter which Mr Shchechka, who had arrived after that conversation, signed. Mr Kubesch said he asked for the letter because *“I wanted evidence that they sent me home that day and did not want me to carry on with my work”*.

[36] Mr Baumann’s account confirmed he was not satisfied with Mr Kubesch’s explanation about the problem in installing the crown mouldings, particularly because another worker had completed the whole task in the following day. However Mr Baumann could not, and did not, deny having sent Mr Kubesch away from work on

28 April in the manner that he did. In doing he had wrongly believed he was entitled to end the employment in that way because of its ‘casual’ nature.

[37] His actions on behalf of CPL failed to meet the statutory test of justification for the following reasons:

- (i) CPL’s evidence did not establish in any conclusive way that both the Stanford Park Road project was, in fact, finished to the degree that there was no other work available for Mr Kubesch and that there was no other work on other projects that he could do.
- (ii) The oral evidence of Mr Baumann and Mr Shchechka established that they had a range of performance concerns with Mr Kubesch that they had not openly addressed with him, had not set monitorable standards for improvement, and had not made decisions about the future of his employment until after giving him a reasonable opportunity to meet those standards.⁹
- (iii) Mr Baumann had not acted in good faith towards Mr Kubesch because he told him he was happy with his work and would consider him for further work (including on the 17 April telephone call) when Mr Baumann was, in fact, not happy – with the consequence that Mr Kubesch was not provided with information that was relevant to making a decision with an adverse effect on the continuation of his employment.¹⁰
- (iv) Mr Baumann had formed the view that Mr Kubesch had lied to CPL about the extent of his experience, particularly in New Zealand, and described that view as being the basis for “*part of my decision*”, but he had not clearly put that view to Mr Kubesch and given him an opportunity to comment about it before making the decision about the future of his employment with CPL.

[38] There were ‘day-to-day’-type discussions that Mr Baumann and Mr Shchechka had with Mr Kubesch about his work and how he carried it out. For example, Mr Baumann said he had asked Mr Kubesch not to smoke inside the houses he worked on and he had also spoken to him about working as a team because Mr Kubesch had refused, on one occasion, to help clean up the workshop and had made critical comments about the skills of other workers. He also said Mr Kubesch did not work well with people of other nationalities. However none of those discussions

⁹ *Trotter v Telecom* [1993] 2 ERNZ 659, 681

¹⁰ Section 4(1A)(b) and (c) of the Act.

occurred in a context where Mr Kubesch was properly on notice of the potential impact on the continuation of his employment. Instead, believing CPL was free to dispense with his services as a casual, Mr Baumann dismissed Mr Kubesch in a manner that was unjustified when measured against the statutory standard of what a fair and reasonable employer could have done in all circumstances at the time.

Remedies

Lost wages

[39] Mr Kubesch sought an award of three months' lost wages as one remedy for his personal grievance of unjustified dismissal but I have concluded the appropriate award was for four weeks' wages.

[40] In seeking that remedy, Mr Kubesch was obliged to show what he had done to seek other work and income during that period from 29 April to 28 July 2014 because:¹¹

... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[41] He produced copies of email correspondence that suggested he had made nine job applications on 26 or 27 July 2014 but only four on earlier dates – 30 April, 1 May, 9 May and 14 May. He said he had actively searched for jobs on other days but could not produce evidence of it. He had no explanation for the absence of any applications during June but Ms De Ath said they had moved house that month and he spent a lot of time on that.

[42] Other contingencies also needed to be considered in assessing the actual period of loss for which an award could be made.¹² While there was no suggestion of any health factors effecting Mr Kubesch's ability to work in those months, there was

¹¹ *Allen v Transpacific Industries Group Ltd (t/a Medismart Ltd)* AC20/09, 4 May 2009 at [78].

¹² *Telecom New Zealand v Nutter* [2004] 1 ERNZ 315 (CA) at [73].

the prospect – even if CPL had treated him fairly – that there would not have been enough work for him and his employment may have ended anyway. The planned Manukau project was said to have been delayed so that work may not have been available to him after a few more weeks in any event. He might also have been justifiably dismissed, if a fair process was followed, if Mr Baumann and Mr Shchechka had properly raised and dealt with their performance concerns with him.

[43] The award of \$4536 due under s123(1)(b) of the Act has been calculated on the basis of a 42-hour week at Mr Kubesch's hourly rate of \$27. It has allowed for the fact that on some days he had typically worked longer than eight hours and done some Saturday work.

Compensation for hurt and humiliation

[44] Mr Kubesch sought an order for \$5000 compensation for humiliation, loss of dignity and hurt feelings. His evidence was that he was shocked and felt cheated by what he said was the sudden and rude manner of his dismissal. He described himself as experiencing feelings of worthlessness as a result and Ms De Ath described observing his mood as “*quite low*” in the following weeks and said he was not getting out of bed.

[45] Considering the particular circumstances of the case and the general range of awards in cases of this type I concluded \$5000 was the appropriate award of compensation under s123(1)(c)(i) of the Act.

Any reduction for contribution

[46] Under s124 of the Act the Authority must consider the extent to which Mr Kubesch's actions contributed to the situation giving rise to his grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded.

[47] Mr Baumann suggested that his concerns about whether Mr Kubesch had accurately represented his skills and experience at interview, Mr Kubesch's attitude to other workers and how he carried out his work were factors that contributed to the situation. However the failure of CPL to properly address those issues by open

discussion with Mr Kubesch, including if necessary by holding disciplinary meetings, provided an inadequate basis to reach a conclusion that his conduct was sufficiently blameworthy to require a reduction of the relatively modest remedies awarded.

Wages arrears

[48] Mr Kubesch sought wages arrears for nine days he said he worked but was not paid, two days he said he was underpaid, one public holiday for which he was not paid, and five days annual leave.

Unpaid or underpaid days

[49] Mr Kubesch was not required to fill in a timesheet and have it signed off by a supervisor. Most other CPL workers supposedly ‘clocked in’ or ‘clocked out’ at the workshop but he was not required to do that and often went directly to the installation site if he was working there. He and Ms Korneeva operated a system whereby he sent her a tally of his hours by text for each fortnightly pay period. Mr Baumann said CPL used “*a degree of honesty*” with its employees but hours claimed were also checked with site managers. Ms Korneeva kept a spreadsheet of hours paid but there were no company records provided that showed what hours were recorded or reported by site managers.

[50] There was also nothing to indicate the basis on which CPL had decided not to pay Mr Kubesch for all the hours he claimed in what proved to be his last full fortnight of employment. They were set out in a text he sent Ms Korneeva on 23 April and she had replied that he should get Mr Baumann or Mr Shchechka to authorise payment for those hours.

[51] The spreadsheet kept by Ms Korneeva showed Mr Kubesch was absent on 10, 11, 12 and 16 April but did not refer at all to the days of 14 and 15 April. Mr Kubesch said he worked on all of those six days, relying on hours he had recorded in his diary, along with a further two days – 19 April and 24 April – for which he was not paid. His claim included a further 8.5 hours for 28 April, the day he was sent away from CPL. He also claimed he was short paid three hours for work done on 17 and 22 April.

[52] In the absence of better records from CPL – and particularly the basis on which hours were or were not authorised for payment – I have preferred Mr Kubesch’s account of days worked, accepting his diary notes for those days were more likely than not to be correct. I reached that view because Mr Kubesch was also able to produce some work-related photographs that he took on his mobile telephone camera for some days that CPL said he was absent from work. Copies of those photos on his laptop computer included a date stamp showing when they were taken. Photos for two of those days were taken in the CPL workshop and included Mr Baumann’s brother in the picture.

[53] However the hours Mr Kubesch claimed for some unpaid days were longer than his apparently typical 8 or 8.5 hours. As a matter of broad assessment I considered the wages arrears order should be limited to eight hours a day for April 10, 11, 14, 15, 16, 24 and 28 and one hour a day for April 12 and 19. I have made no allocation for 17 and 22 April where he was paid eight hours but said he had worked some additional hours that were not paid. The resulting tally of 58 hours at the hourly rate of \$27 totalled \$1566.

Public holiday pay

[54] Mr Kubesch was not paid for Anzac Day but given his pattern of work he was entitled to be paid for it. A further \$216 was due as wage arrears as a result.

Annual leave

[55] Mr Kubesch was not paid any annual leave entitlement at the conclusion of his employment. He had taken no paid annual leave while working for CPL. The employment agreement said to have been given to him included a clause stating eight per cent would be paid on gross taxable pay at the end of each pay period. The clause stated this was agreed as the employment fell under the circumstances provided for in s28 of the Holidays Act 2003.

[56] That section of the Holidays Act allows holiday pay to be paid with an employee’s pay under certain, cumulative conditions that were not met in this case.

Mr Kubesch was not employed on a valid fixed term agreement under s66 of the Employment Relations Act. He did not work on such an intermittent and irregular basis that it was impracticable for CPL to provide him paid annual leave. He, arguably, had not agreed to a holiday pay loading in his employment agreement. And the holiday pay was not an identified component on the pay slips sent to him (according to copies provided to the Authority).

[57] As a result Mr Kubesch was not properly paid holiday pay due to him, under s23 of the Holidays Act, at the conclusion of his employment. He was entitled to five days' annual leave to be paid in his final pay. Calculated for the purposes of this determination on the basis of an approximated average of a 42 hour week, the further award of wage arrears required for those five days was for \$1134.

Interest

[58] The wage arrears ordered for unpaid days, one public holiday and five days of annual leave totalled \$2916. Those were funds Mr Kubesch was entitled to have the use of from his last day work. Accordingly an order for interest on that amount was appropriate for the 316 days from 29 April 2014 to the date of the Authority investigation. The resulting figure, at the relevant statutory rate of five percent, was \$126.22.¹³

Costs

[59] Mr Kubesch represented himself in bringing his claim and no order for costs was required.

Robin Arthur
Member of the Employment Relations Authority

¹³ Clause 11 of Schedule 2 of the Act and clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177).