

for breaches of ss.56, 24 and 81 of the Holidays Act 2003 and s.229(3) of the Employment Relations Act 2000 and reimbursement of costs and expenses.

[4] The respondent acknowledges it owes Mr Trayer for three statutory days on which he worked. It says he did not work on Good Friday 2008 as the bar was closed that day. It accepts he worked Anzac Day, Labour Day and Canterbury Anniversary Day in 2008 and has offered to pay Mr Trayer what is owed to him for those times.

[5] In respect of the Inspector's holiday pay claim, the respondent says the agreement between the parties at the outset of the employment relationship was that the \$1,000 per week was inclusive of annual leave entitlement. It says this was due to the venture being tentative and it wanted to ensure Mr Trayer was receiving holiday pay on a fortnightly basis in the event the venture was unsuccessful.

Essential facts

[6] Mr Trayer was employed as the manager of Club SE in Christchurch on or about 20 December 2007 according to the respondent. It says he began work under their agreement on 11 January 2008 and continued until the position was made redundant on 20 January 2009. The redundancy was advised to Mr Trayer by letter dated 22 December 2008.

[7] Mr Trayer says he was involved in work for the respondent prior to 11 January 2008. The respondent says there was no agreement for this pre-employment work but was prepared to pay \$800 on 14 January 2008 in consideration of that work.

The nature of the employment

[8] No written individual employment agreement was signed between the parties. The respondent's view is the arrangement was fixed term and therefore permitted the payment of holiday pay to Mr Trayer along with his fortnightly salary.

[9] Mr Trayer says the employment was open-ended until terminated by either party. He says that notice of termination came by way of the respondent's letter on 22 December 2008, the letter referred to above.

[10] I find the nature of the employment was permanent part time and was not a fixed term agreement as defined in s.66 of the Employment Relations Act 2000.

[11] The Club opened only on weekends (apart from the occasional private function) between 7pm and 4am, although the manager and staff needed to attend to pre-opening and post-closing tasks.

The statutory framework

[12] Section 27 Holidays Act 2003 establishes annual holiday pay is to be paid before the annual holiday is taken or when the employment ceases.

[13] Section 28 Holidays Act 2003 codifies the circumstances in which an employer may pay holiday pay to an employee regularly despite the rule set out in s.27 that the holiday pay is to be paid at the time the holiday is taken.

[14] Section 28 of the Act reads as follows:

When annual holiday pay may be paid with employee's pay

- (1) *Despite s.27, an employer may regularly pay annual holiday pay with the employee's pay if –*
- (a) *The employee –*
 - (i) *Is employed in accordance with s.66 of the Employment Relations Act 2000 on a fixed term agreement to work for less than six months, or*
 - (ii) *Works for the employer on the basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with three weeks' annual holidays under s.16; and*
 - (b) *The employee agrees in his or her employment agreement; and*
 - (c) *The annual holiday pay is paid as an identifiable component of the employee's pay; and*
 - (d) *The annual holiday pay is paid at a rate not less than 8% of the employee's gross earnings.*
- (2) *If an employee to whom subsection (1)(a)(i) applies is employed by the same employer beyond 12 months on a series of fixed term agreements of less than 12 months each, the employer and the employee may agree that the employee is to be paid in accordance with subsection (1) regardless of the number of agreements.*
- (3) *If the fixed term agreement of an employee to whom subsection (1)(a)(i) applies is followed by permanent employment with the same employer, the employee –*
- (a) *Becomes entitled to paid annual holidays at the end of 12 months continuous employment (including the period of that fixed term agreement) under s.16; but*

- (b) *The amount of the holiday pay that the employee is entitled to be paid for the holidays is reduced by the amount that the employee has already received under subsection (1).*
- (4) *If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with s.16 and paid in accordance with this sub part.*

Discussion and analysis

[15] I have found the complainant was not employed under a fixed term agreement. Further, his hours were regular, not intermittent and so the first condition is not met.

[16] In the absence of a written employment agreement, the second condition is not met.

[17] I am satisfied that, with the exception of the first pay slip, holiday pay was identified as a "taxable allowance" on all pay slips issued to Mr Trayer thereafter, including the replacement slip for the first pay slip.

[18] I am also satisfied the holiday pay paid was at the correct rate of 8%.

[19] The difficulty for the respondent is that all four conditions must be met. Two out of four does not meet the statutory test. Although the respondent's reason for paying Mr Trayer in this manner are understandable, they are nonetheless in breach of the statute.

Statutory days

[20] As noted above, the Club's operating hours were generally restricted to weekends, including Fridays. Good Friday was a public holiday. However, the evidence was clear the Club was not opened that evening. No EftPos transactions took place and two complaints were received by the respondent from people who had travelled considerable distances to Christchurch only to find it closed.

[21] The respondent accepts it owes Mr Trayer payment for the three statutory holidays on which it did work. It denies it owes him for Good Friday 2008. I concur with that view.

Determination

[22] The respondent, being in breach of s.28 of the Holidays Act 2000, is to pay to the applicant for the use of Mr Trayer the sum of \$2,829.86 for holiday pay.

[23] The respondent is to pay the applicant for the use of Mr Trayer the sum of \$833.40 gross for unpaid statutory days.

[24] The Labour Inspector's applications for interest and penalties are declined.

Reasons

[25] I have denied the applications for penalties and interest for the following reasons.

[26] Those coming to the Authority to seek justice must do so with clean hands. In the light of the evidence before me, I am thoroughly satisfied Mr Trayer was paid his annual holiday pay in full. The evidence is the full complement of his wage records which clearly shows fortnightly sums of 8% paid to Mr Trayer. He sought to establish non-payment by using the initial wage slip which did not isolate the holiday pay component, but was later replaced once the respondent had solved its problems in having its MYOB payroll isolate that component. Mr Trayer did not produce this corrected slip nor any other payslips in his evidence.

[27] In respect of his claim for Good Friday 2008, Mr Trayer's evidence was that he worked that day. In support of this, he had Ms Pamela Hunter, a co-worker and close friend, swear an affidavit confirming she had worked with him at the Club that night. The evidence of the two members who complained they had travelled to attend the Club to find it closed and the bank's confirmation that no EftPos transactions took place on the premises that might convince me the affidavit is disingenuous.

Costs

[28] There will be no order for costs. The applicant is entitled to have his lodgment fee of \$70 refunded by the respondent. I so order.

