IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2023] NZERA 297
3187719

	BETWEEN	EDDY MARTIN Applicant
	AND	WELLINGTON LAUNDRY SERVICES LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Ronald Jones, advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	23 May 2023 at Wellington
Submissions:	At the Investigation Meeting from Applicant
Determination:	8 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Eddy Martin was employed by Wellington Laundry Services Limited (WLS) from 16 August 2019 until February 2021 as a Driver & Laundry Assistant, although his last day of work was in January 2021. While his employment agreement was labelled as "casual", Mr Martin claims that in practice his employment was permanent.

[2] Mr Martin's employment relationship problem arose when he initially queried pay arrangements and what he says was a lack of pay slips. Mr Martin then required time off work for medical reasons and when he sought this was denied leave, being told that he was not entitled to annual holidays due to the casual nature of his employment relationship. He says that things progressed from his queries to a situation where he lost

faith in his employer and was compelled to resign, which he claims should be treated as an unjustified constructive dismissal.

[3] WLS has not provided a response to Mr Martin's employment relationship problem.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Martin, his partner Joshua Aarons and Mr Aarons' mother, Amanda Aarons. Mr Martin and Mr Aarons answered questions, under affirmation, from me and from Mr Martin's representative. Mr Martin's representative also provided oral closing submissions. Ms Aarons was unable to attend the investigation meeting to affirm their witness statement or answer questions, and I have placed no weight on her witness statement.

[5] There was no appearance at the investigation meeting by WLS and has been no engagement in the Authority's process, including at a case management conference on 28 November 2022.

[6] The Authority has the power to proceed under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), if any party, without good cause, fails to attend, and may act fully in the matter before it, as if that party had duly attended or been represented.

[7] Authority records show that the service of documents, including the statement of problem, notice of investigation meeting, Directions of the Authority, witness statements and reminder of the investigation meeting has been successful at various times at WLS' business address and an address for the sole Director and shareholder of WLS, Peter George.

[8] Included in the notices that WLS and Mr George received was advice that if WLL (or its representative) did not attend the investigation meeting, the Authority may, without hearing the evidence from WLS, issue a determination in favour of the Mr Martin. An Authority Officer attempted to contact Mr George on the day of the investigation meeting but the call was terminated after ringing once. No reason was provided by WLS or Mr George for non-attendance at the investigation meeting on 23 May 2023, and the investigation meeting proceeded.

[9] 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

[10] The issues requiring investigation and determination were:

(a) Was Mr Martin a casual or permanent employee of WLS?

(b) Was Mr Martin unjustifiably (constructively) dismissed by WLS?

(c) Was Mr Martin unjustifiably disadvantaged in his employment having regard to:

(i) a failure by WLS to make payment and/or provide leave in accordance with any entitlements?

(ii) incorrect payments being made in relation to statutory holidays?

(iii) any breach of good faith by WLS?

(d) If WLS' actions were not justified (in respect of dismissal or disadvantage), what remedies should be awarded, considering:

(i) lost wages; and

(ii) compensation under section 123(1)(c)(i) of the Act.

(e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Martin that contributed to the situation giving rise to his grievance?

(f) Is Mr Martin entitled to payment for outstanding entitlements in relation to unpaid wages, annual holidays, public holidays, sick leave or bereavement leave?

(g) Did WLS fail to provide Mr Martin with a wages and time record, and holiday and leave record when requested to do so?

(h) If so, should penalties be imposed under s 130 of the Act and s 75 of the Holidays Act 2003 (HA2003), and should any part of those penalties be paid to Mr Martin?

(i) Should either party contribute to the costs of representation of the other party.

Was Mr Martin a casual or permanent employee of WLS?

What is the legal position?

[11] Casual employment is not defined in the Act, and therefore the factual evidence is of paramount importance in determining whether or not the employment is casual or permanent in nature. A strong indication that the relationship is that of casual employment is the lack of an obligation on the employer to offer ongoing work, or for the employee to accept it when offered.

[12] The Employment Court judgment in *Jinkinson v Oceania Gold (NZ) Ltd* set out a number of indicia for determining whether or not the nature of the employment was casual or permanent, which are:[1]

> (a) the number of hours worked each week;
>
> (b) whether work is allocated in advance by a roster;
>
> (c) whether there is a regular pattern of work;
>
> (d) whether there is a mutual expectation of continuity of employment;
>
> (e) whether the employer requires notice before an employee is absent or on leave; and
>
> (f) whether the employee works to consistent starting and finishing times.

[13] The Court went on to state that "While the agreement defined the parties' arrangement at the outset, the time at which the nature of their relationship needs to be determined for the purposes of this case is when it ended"[2] before concluding "In reality, the employment arrangement described in the original agreement was abandoned in favour of an ongoing employment relationship which was undoubtedly based on a contract of service."[3]

What did Mr Martin's employment agreement say?

[14] Mr Martin provided a copy of his employment agreement, which described his employment as "a casual "as required" employment relationship" and included some provisions consistent with this related to WLS giving reasonable notice of when Mr Martin would be requested to work (clause 3.1).

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[1] *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].
[2] Ibid at [62].
[3] Ibid at [67].

[15] The agreement also provided (in clause 6.1) that Mr Martin:

> … has no fixed hours of work, nor any minimum hours of work. The hours of work and days to be worked will be as agreed between the Employer and Employee from time to time. The Employee shall take all reasonable steps to be available when required.

[16] There are, however, some provisions in Mr Martin's employment agreement that are not consistent with it truly being a casual employment relationship. The primary provision that indicates this relates to annual holidays, where Mr Martin was entitled to four weeks annual holidays after 12 months continuous employment (clause 8.1). Annual holidays provided in this way is unlikely to be a feature of a casual employment arrangement. I return to this provision at paragraphs [66] to [70] below, as WLS appeared to not follow this provision by paying Mr Martin "Casual Holiday Pay" which appears to have been at 8% of Mr Martin's gross earnings.

[17] Similarly the provisions in relation to public holidays (clauses 8.2 and 8.3), sick leave (clauses 8.4 and 8.5), bereavement leave (clause 8.6), parental leave (clause 8.7), unpaid leave (clause 8.8) and payment when called for jury duty (clause 8.9) are not consistent with the employment arrangement being casual in nature. I consider most significant amongst these provisions was the requirement for applications for unpaid leave, which is inconsistent with the employment arrangement being casual in nature. This provision stated:

> Applications for unpaid leave will be given reasonable consideration by the Employer, but shall be granted only at the Employer's sole discretion having regard to the requirements of the Employer's business and operations. …

[18] In addition, there was a provision for variations to hours of work, which provided for variation to occur by mutual agreement or, in the absence of agreement, by WLS, following consultation with Mr Martin and subject to a requirement that any increase in hours of work is reasonable (clause 6.4). The notion of varying hours of work in this way is inconsistent with the employment arrangement being casual in nature.

[19] I do not consider that the label on Mr Martin's employment agreement is determinative of his employment status and have considered the other matters in the indicia outlined by the Employment Court.

What were the hours worked, was work allocated in advance by a roster and was there a regular pattern of work?

[20] I have considered these indicia together, as the evidence provided for these indicia overlapped.

[21] Mr Martin provided a document that he said was provided by Mr George around the time that his employment ended titled "One Off Report from 18/08/2019 to 31/01/2021" which provided pay period details of Mr Martin's gross earnings, deductions including for tax and Kiwisaver, and nett payments. Mr Martin confirmed at the investigation meeting that the amounts matched payments that he received. He also provided six payslips for pay periods in August and September 2019, and one payslip for the pay period ending 01/11/2020.

[22] Mr Martin said that he had requested copies of payslips on multiple occasions but had been rebuffed with general promises that Mr George would provide them when he was able to. Mr Martin's advocate specifically requested records of pay and time sheets, when formally raising Mr Martin's personal grievance with WLS.

[23] These were not provided when requested, however, I am satisfied that the limited records that were available are sufficient to reach the findings below, based on Mr Martin's evidence. The fact that WLS did not engage in the Authority's processes at all means that I do not have any evidence to the contrary from it. While for a different context, being for the purposes of assessing arrears and HA2003 entitlements, I am able to rely on Mr Martin's evidence as to hours, days and times worked, due to the failure of WLS to produce a full wages and time record, and holidays and leave record when requested, as discussed further at paragraphs [56] and [57] below.

[24] Mr Martin said that his role as a driver was to deliver laundry bags to WLS' clients, performing three to four runs per day he worked. This involved loading bags of laundry into a delivery van, making deliveries to clients and in some cases unpacking laundry into clients' premises. He described the work as being rostered with set days and runs, without there being an option to accept work on an engagement-by-engagement basis, rather he felt there was an expectation that he be available when he was told he was rostered to work. While he says there was a base roster, which did change several times as other drivers came and went, he considered that there was an expectation that he would work certain days and runs.

[25] I consider that the report of Mr Martin's earnings shows that he worked regular days, for a substantial number of hours, based on his pay rates of $19.00 or $19.50 per hour (evidenced by the payslips provided) and payments that range between:

a. $846.45 and $1241.46 for the pay periods ending between 25/08/19 and 19/04/20, with three exceptions noted below – this equates to between 41.25 and 60.5 hours of work per week, which I consider likely means that Mr Martin was working a roster of five or six days per week over this period;
b. $610.74 and $789.75 for the pay periods ending between 26/04/20 and 04/10/20, with two exceptions noted below – this equates to between 29 and 37.5 hours of work per week, which I consider likely means that Mr Martin was working a roster of four or five days per week over this period; and
c. $849.41 and $1089.85 for the pay periods ending between 18/10/20 and 17/01/21, with three exceptions noted below – this equates to between 40.33 and 51.75 hours of work per week, which I consider likely means that Mr Martin was working a roster of five or six days per week over this period.

[26] Mr Martin's evidence was that he worked a mix of regular rosters involving between four and six days per week, apart from when he went away for a few days over the Christmas and New Years periods, and a period when he requested reduced hours. This is consistent with the above evidence and calculations, with the following exceptions:

a. For the three pay periods ending between 29/12/19 and 12/01/20 Mr Martin was paid $374.49, nothing and $574.56. This equates to 18.25 hours for the first week and 28 hours for the third week;
b. For the pay period ending 05/07/20 Mr Martin was paid $152.09. This equates to approximately 7.25 hours for that week;
c. For the pay period ending 20/09/20 Mr Martin was paid $926.64. This equates to 44 hours for that week, which may reflect an extra day being worked that week, as this is an outlier amongst surrounding weeks;
d. For the pay period ending 11/10/20 Mr Martin was paid $424.72. This equates to 20.17 hours for that week, which may suggest only two or

three days being worked that week, which is also an outlier amongst surrounding weeks;

e. For the pay period ending 01/11/20 Mr Martin was paid $1,474.20. This equates to 70 hours for that week, although this pay period is also an outlier amongst surrounding weeks. I am unable to form a clear view about the number of days worked that week, as there were additional items detailed in this payslip, as discussed at paragraph [61] below; and
f. For the pay period ending 03/01/21 Mr Martin was paid nothing.

[27] I am satisfied that the evidence provided by Mr Martin establishes that he worked regular patterns of work, set in advance by base rosters, with some minor variability in actual hours worked across weeks. This is strongly supportive that Mr Martin's employment with WLS had, by nature of the parties' conduct, become permanent.

Was there a mutual expectation of continuity of employment?

[28] The Employment Court in *Jinkinson* described this indicia in the following way:[4]

> where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[29] There are a number of provisions in Mr Martin's employment agreement which are indicative of mutual obligations, including the provisions in relation to variations to hours of work (clause 6.4), annual holidays (clause 8.1), parental leave (clause 8.7), unpaid leave (clause 8.8) and payment when called for jury duty (clause 8.9), discussed at paragraphs [16] to [18] above. These provisions are indicative of mutual obligations rather than a casual employment arrangement, particularly the requirement for applications for unpaid leave and the provision for variations to hours of work, which provided, in the absence of agreement, WLS with the ability to vary Mr Martin's hours of work, following consultation with Mr Martin and subject to a requirement that any increase in hours of work is reasonable.

[30] In addition, the employment agreement included provisions for restructuring and redundancy (clause 12), notice for termination (clauses 13.1 to 13.3), termination

[4] Ibid at [52].

on medical grounds (clause 13.5) and abandonment of employment (clause 13.6). These were the same types of provisions referred to by the Employment Court in *Jinkinson* when it said:[5]

> If the parties intended this to be a casual employment arrangement under which they had no obligations to each other between periods of work, no such provisions were necessary and their presence suggests this was not what was intended.

[31] Mr Martin also said he was expected to do the shifts that were his base roster, which was renegotiated as other drivers came and went, but felt "guilted" to maintain his hours of work, even after having advised that his mental health was suffering from over-work. Mr Martin's evidence was:

> I had not had a single week of less than 35 hours, with no opportunity of turning down shifts without my position at Wellington laundry Services being threatened. In my entire 18 months of being an employee for Wellington Laundry Services I was never contacted to check on my availability as a casual employee, it was just assumed that I would be attending work and if I expressed anything otherwise, I was either coerced into shifts or had my position threatened.

[32] I consider that all of the above are clear evidence of mutual expectations of continuity of employment and WLS treated Mr Martin as a permanent employee.

Did WLS require notice before Mr Martin was absent or on leave?

[33] Mr Martin's employment agreement contained extensive provisions in relation to leave (clause 8, discussed at paragraphs [16] and [17] above) which required both notice of requests for annual holidays and unpaid leave. There was also provision for medical certificates to be provided for sick leave. Mr Martin provided evidence that he took some sick leave, which he suggested was paid but had no pay records to confirm this was the case, as well as leave at Christmas, although he said that was unpaid. The fact that Mr Martin's records of pay show reduced pay for the pay period ending 29/12/19 and no payments for the pay periods ending 05/01/20 and 03/01/21 support this. I consider that this indicia supports the employment relationship being as a permanent employee.

[5] Ibid at [57].

Did Mr Martin work to consistent starting and finishing times?

[34] Mr Martin said that he worked to a series of consistent base rosters, dependent on the number of runs he was doing each day. I consider that this is sufficient to demonstrate consistency of working times.

Overall conclusion: Mr Martin was a permanent employee

[35] For all of the above reasons I find that when Mr Martin's employment ended he was employed on a permanent basis. He was not a casual employee.

Was Mr Martin unjustifiably (constructively) dismissed by WLS?

[36] A constructive dismissal occurs where an employee appears to have resigned but the situation is such that the resignation has been forced or initiated by an action of the employer. In this case Mr Martin claims that he was constructively dismissed as a result of losing faith in Mr George and WLS when he sought to take leave to deal with a medical issue in January 2021.

[37] At that time Mr Martin says he was told he had no annual holidays entitlements, as he had been paid annual holiday pay of 8% weekly as part of his pay, due to him being a casual employee. He also said that Mr George suggested that he apply for ACC, offered to pay him "under the table" and then to pay him through WLS for an amount that was around half of his regular earnings. Mr Martin says he had sought advice and, in the circumstances, he regarded himself as having no option but to resign.

The legal approach to a constructive dismissal

[38] In some circumstances a resignation may amount to a dismissal. The Court of Appeal in *Wellington Clerical Union v Greenwich* stated that:[6]

> There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. …
>
> It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[6] *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

[39] The Court of Appeal listed three situations in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:[7]

(a) Where the employee is given a choice of resignation or dismissal;

(b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

(c) Where a breach of duty by the employer leads a worker to resign.

[40] Submissions for Mr Martin relied on the third situation described by the Court of Appeal in *Woolworths*, being that a breach of duty by WLS led him to resign.

[41] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* set out the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.[8] In determining that all the circumstances of the resignation must be examined not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make resignation reasonably foreseeable.

[42] Mr Martin has the burden of establishing that the resignation was a dismissal.

What was the reason for Mr Martin's resignation?

[43] Mr Martin's claims that he lost faith in Mr George and WLS due to their approach to payment when he sought to take leave to deal with a medical issue in January 2021. He further said that the under the table offer made by Mr George was not in good faith and made him feel like he was being presented an offer on a "take this and keep quiet" basis, when he had legitimately asked questions about his employment entitlements. Mr Martin provided evidence at the investigation meeting of contemporaneous journal entries which showed his frustration at Mr George's responses to his request, including that:

> He offered me $450 per week during my leave but from him personally, not thru [sic] the business. He said the business would not pay. Dodgy as [f*ck]. I said I'm not comfortable taking money from him personally. He said there's

[7] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.
[8] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

> nothing illegal about it and if I didn't want to accept them [sic] we would have to get lawyers involved.

[44] In addition, Mr Martin says he had asked questions about his payment arrangements in late 2020, which was met with aggressive, confrontational and abusive responses. Mr Aarons provided corroborating evidence of this.

Was Mr Martin's resignation caused by breaches of WLS' duty?

[45] An employer is expected to behave in good faith towards an employee. In the circumstances where Mr Martin was seeking leave to deal with a medical issue and says was unable to access entitlements to sick leave or annual holidays on full pay, in the absence of any evidence from WLS (or Mr George) to the contrary, I find that WLS did not deal with Mr Martin in good faith. As discussed below at paragraphs [66] to [70] I also consider that WLS did not provide Mr Martin with his entitlements to annual holidays under his employment agreement or the HA2003.

[46] Combined, I find that Mr Martin's resignation was caused by these breaches of duty by WLS.

Was Mr Martin's resignation reasonably foreseeable?

[47] Having reached this finding, I am required to consider whether Mr Martin's resignation was reasonably foreseeable.

[48] In the circumstances described above and given the nature of breaches of duty that I have found on the part of WLS, I consider it entirely foreseeable that Mr Martin would resign. At the time of need for an understanding and supportive employer when he was dealing with a medical issue, Mr Martin was treated in an unacceptable manner.

[49] Mr Martin provided a copy of his emailed notice of resignation at the investigation meeting, which supplemented the notice of personal grievance his representative sent to Mr George, on behalf of WLS. These clearly set out the issues that led to Mr Martin's resignation and that he intended to take legal action. He also provided the one weeks' notice of resignation, as required by his employment agreement. This provided a clear opportunity for WLS to engage with Mr Martin, which I was told it did not take. Neither did WLS engage with Mr Martin or his representative following his personal grievance being raised.

[50] The factual matters that Mr Martin's unjustified disadvantage claims were based on were the same as those on which the finding of unjustified constructive dismissal was made so I make no separate findings on those claims.

What remedies should be awarded to Mr Martin in relation to his unjustified constructive dismissal?

[51] Having determined that Mr Martin was unjustifiably constructively dismissed, I need to consider what remedies should follow. Mr Martin has sought compensation for hurt and humiliation under s 123(1)(c)(i) of the Act. At the investigation meeting, I asked whether Mr Martin was seeking compensation for lost wages and he advised that he was not. I have therefore considered only remedies under s 123(1)(c)(i) of the Act.

[52] Mr Martin provided evidence of significant impact on him, primarily resulting in stress due to the financial consequences of resigning while dealing with a significant medical issue. The combined consequences of this led to extreme anxiety, depression, impacts on his relationship, confidence in seeking new employment and potentially trust in future employment situations. Mr Aarons corroborated the impacts that these circumstances had on Mr Martin and their relationship.

[53] I find that Mr Martin's unjustifiable constructive dismissal had a significant impact on Mr Martin and that an award of compensation is appropriate. Subject to any contribution, Mr Martin is entitled to payment of compensation in the sum of $20,000 under s 123(1)(c)(i) if the Act. In reaching this figure I have taken into account other comparable cases.

Should remedies be reduced (under s124 of the Act) for blameworthy conduct by Mr Martin that contributed to the situation giving rise to his grievance?

[54] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mr Martin that contributed to the situation giving rise to his grievance. I have no evidence that would suggest that was the case and it is hard to envisage, given the findings I have made at paragraphs [43] to [45] above about WLS' breaches of duty, that Mr Martin could have been viewed as contributing in any way. Accordingly, I do not reduce the award of remedies.

Is Mr Martin entitled to payment for outstanding entitlements in relation to unpaid wages, annual holidays, public holidays, sick leave or bereavement leave?

[55] Mr Martin sought payment for outstanding entitlements in relation to unpaid wages, annual holidays, public holidays, sick leave or bereavement leave. He says that in late 2020, around the time of Labour weekend, he raised questions of whether he was being paid appropriately with Mr George. Mr Aarons gave evidence that when he visited Mr Martin at that time, they discussed his pay and were concerned that Mr Martin may not have been paid properly. The fact that Mr Martin has a payslip for the pay period ending 01/11/2020 provides some credence to his claims that he raised questions about his pay at this time.

WLS failed to provide Mr Martin with a wages and time record, and holiday and leave record when requested to do so

[56] Mr Martin says that he has provided the Authority with all pay records that he was provided by Mr George on behalf of WLS. His representative clearly requested that all pay and time sheets be provided as part of raising Mr Martin's personal grievances. Mr Martin and his representative say that those requests were not responded to, other than the material that I was provided. In these circumstances I consider that s 132(1) of the Act applies and find that Mr Martin has shown that WLS failed to produce a wages and time record when requested to do so, which has prejudiced Mr Martin's ability to bring an accurate claim for arrears under s 131. I may, therefore, accept under s 132(2)(b) that Mr Martin's claims are proved as to the hours, days and time that he worked. As WLS have not provided any evidence in this matter, they have not proved Mr Martin's claims to be incorrect.

[57] I also accept that s 83(3) of the HA2003 applies and find WLS has failed to provide copies of a holiday and leave record, which has prevented Mr Martin from bringing an accurate claim under the HA2003. I may, therefore, accept under s 83(4) of the HA2003 Mr Martin's statements about holiday pay or leave pay actually paid to him, and annual holidays or public holidays actually taken by him. Again, WLS have not provide any evidence to the contrary.

Unpaid wages, sick leave and bereavement leave claims are not adequately proved

[58] While Mr Martin made claims for unpaid wages, sick leave and bereavement leave, I find that these were not adequately proved. This is because he was unable to say with confidence how many hours he had worked or to estimate beyond general

statements that he thought he may not have been paid for all hours he worked. He accepted that the payments shown in the pay records had been made to him and was unable to advance any concrete claim that those payments were incorrect.

[59] He also thought that he had been paid some sick leave and was not clear when he may have been sick but not paid. Neither did he advance evidence of bereavement situations when bereavement leave was not paid.

Mr Martin is entitled to be paid for alternative holidays and public holidays that would otherwise have been working days, but has not adequately proved that he did not get time and half for public holidays worked

[60] I accept Mr Martin's evidence that he worked two of the four public holidays over each of the Christmas and New Years periods that he was employed and one Labour Day. No evidence to the contrary was provided by WLS. I therefore find that Mr Martin is entitled to five alternative holidays under s 56 of the HA2003 and should be paid for those in accordance with s 60.

[61] Mr Martin's payslip for the pay period ending 01/11/20 appeared to include payment for a public holiday at ordinary time, which would have coincided with Labour Day that year, although it shows this as "P/Hol Taken 1 Day". There was also reference to a "Special/Bonus" payment on the same payslip. Mr Martin was unclear what this related to. Given this uncertainty and Mr Martin's evidence that he had been told, at some stage, that when time-and-a-half payments were made Mr George's practice was to multiply by the number of hours worked, rather than applying a higher rate, I am not clear that Mr Martin has established that he did not receive time-and-a-half payments when he worked on public holidays. I therefore decline to order any payments for this aspect of Mr Martin's claims.

[62] Given the evidence that Mr Martin received no payment for the pay periods ending 05/01/20 and 03/01/21, I find that he was not paid for public holidays that occurred in those weeks. I consider that the quantum of payments for the preceding pay periods are clear that Mr Martin should have received payments for those days under s 49 of the HA2003 as days that would otherwise be a working day. I find that Mr Martin is due to be paid for four public holidays on this basis.

[63] In the absence of a complete wages and time record, and holiday and leave record I have calculated the value for the five alternative holidays and four public holidays based on Mr Martin's gross earnings for the pay periods ending 26/01/2020

through to 17/01/2021 (being the 52 calendar weeks before Mr Martin's last working week).[9] I have excluded the pay period ending 01/11/2020, due to the additional payments made in that week which Mr Martin could not explain (as discussed in paragraph [61]) and the pay period ending 03/01/2021 when Mr Martin was not paid.

[64] Across the other 50 weeks in this time period Mr Martin was paid a gross total of $38,607.24, after deducting the 8% that appears to have been paid as pay-as-you-go annual holiday pay. Based on Mr Martin's hourly rates, which appear to be $19.00 per hour until the pay period ending 19/04/2020 and then $19.50 per hour for the remaining periods, it appears likely that he worked 238 days over those 50 weeks, which equates to an average daily pay rate of $162.22.

[65] I therefore order that WLS pay Mr Martin $1,459.98 for the five alternative holidays and four public holidays that I have found he was due.

Mr Martin is due annual holiday pay as the requirements of the HA2003 for pay-as-you-go annual holiday pay have not been met

[66] Mr Martin gave evidence that he only became aware that he had been paid his annual holiday pay as part of his regular weekly pay when he sought to take leave to deal with a medical issue in early 2021. While he earlier received payslips which showed this payment arrangement was occurring, I do not consider this impacts on my finding below that this was contrary to s 28 of the HA2003.

[67] Mr Martin's employment agreement was clear that he was entitled to four weeks annual "leave" (clause 8.1). There was no provision for WLS to regularly pay annual holiday pay with Mr Martin's pay, as is required under ss 28(1)(b) and the employment agreement committed to providing four weeks annual holidays. While the payslips I have been provided for Mr Martin did comply with ss 28(1)(c) and (d), in that they had an identifiable line for "Casual Holiday Pay" that appears to have been 8% of Mr Martin's gross earnings for each pay period, this is not sufficient to meet the overall requirements of ss 28(1).

[68] Mr Martin is therefore entitled to annual holidays in accordance with s 16 of the HA2003. Subsection 28(4) applies meaning that WLS is not able to rely on the incorrect

[9] S 9A(2) of the HA2003.

payment of pay-as-you-go annual holiday pay, as Mr Martin was employed by WLS for more than 12 months (commencing on 16 August 2019).

[69] For the four weeks annual holidays that Mr Martin became entitled to on 16 August 2020, I have calculated the amount due based on his ordinary weekly pay based on gross earnings for the pay periods ending 20/12/2020 through to 17/01/2021, excluding the pay period ending 03/01/2021 when Mr Martin was not paid.[10] Across those four pay periods Mr Martin was paid a gross total of $3,427.13, after deducting the 8% that appears to have been paid as pay-as-you-go annual holiday pay. As Mr Martin said he did not take any paid annual holidays, I order that WLS pay Mr Martin $3,427.13 for the four weeks annual holidays that he would have been due at the end of his employment.

[70] In addition Mr Martin is entitled to annual holiday pay based on his earnings since he became entitled to annual holidays.[11] His gross earnings for the pay periods ending 23/08/2020 through to 17/01/2021 were $16,934.19, with 8% of that amount being $1,354.74. I order that WLS also pay Mr Martin this amount.

Should penalties be imposed under s 130 of the Act and s 75 of the HA2003, and should any part of those penalties be paid to Mr Martin?

[71] Mr Martin is seeking penalties for WLS' failure to provide copies of a wages and time record, and holiday and leave record when requested to do so.

[72] Penalties are provided under s 130 of the Act and s 75 of the HA2003 for breaches of the relevant record keeping and production provisions (s 130 of the Act and s 81 and 82 of the HA2003). For a company the maximum penalty in both cases is $20,000.

[73] In deciding whether to impose a penalty, and if I decide to, deciding how much that penalty should be, I need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*.[12]

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[10] S 8(2) of the HA2003. This amount was used under s 24(2) of the HA2003 as it was greater than the average weekly earnings I calculated of $772.14 for the pay periods 26/01/2020 through to 17/01/2021, again excluding the pay periods ending 01/11/2020 and 03/01/2021 for the reasons outlined in paragraph [63].
[11] S 25 of the HA2003.
[12] *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143.

[74] The purpose of penalties is punitive. They are not imposed to remedy the applicant's loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[75] One of the objects of the Act is to promote the effective enforcement of employment standards. The obligations to keep and provide copies of a wages and time record, and holiday and leave record when requested to do so support this object.

Step One – Identify the nature and number of statutory breaches

[76] There are two statutory breaches identified, meriting a penalty to a maximum amount of $20,000. This is a potential total penalty of $40,000. However, I consider in light of the fact that the remedies I have granted relate to non-provision of HA2003 entitlements, it appropriate to provide a penalty for the one associated breach of record-keeping requirements under the HA2003 only. This reduces the total to $20,000.

Step Two – Assess the severity of the breach

[77] Aggravating factors include the fact that the lack of provision of records caused Mr Martin considerable uncertainty about his minimum entitlements and were repeated in response to requests by Mr Martin during and at the end of his employment. Mr Martin's evidence was that Mr George considered it acceptable to provide records when he chose, saying Mr George told him "he was just too busy and would get to it when he could", which is not acceptable business practice.

[78] By asserting that Mr Martin had no entitlements to annual holidays at time when he was facing a significant medical issue and then attempting to pay a lesser amount than was due, under the table, I find that WLS further aggravated the impact on Mr Martin.

[79] As observed by the Court in *Borsboom* it is a matter of common knowledge within the community generally, and the commercial and small business community in particular, that minimum holiday entitlements are applicable to all employment relationships. The situation of Mr Martin is analogous to that in *Borsboom* where WLS "simply allowed their employees no, or at least very inadequate, holidays".[13]

[80] I have no evidence of ameliorating factors on the part of WLS.

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[13] *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143 at [87].

[81] I consider that the penalty amount should be reduced to 50%, in line with the Court's judgment in *Borsboom* related to breaches of record-keeping requirements.[14]

Step Three – Financial circumstances of the Respondent

[82] I have no information that would support the view that WLS' financial position is precarious. In the circumstances, no reduction is made to the penalty on this basis.

Step Four – Proportionality of outcome

[83] In considering the level of penalties awarded in similar cases decided since *Borsboom*, I consider the appropriate level of the penalties in this matter to be $6,000.

Should any part of the penalty be paid to Mr Martin?

[84] The purpose of penalties is to deter, not to compensate. However, I accept that the breaches by WLS were a matter of significant concern to Mr Martin and he was directly affected by those breaches. His ability to identify outstanding entitlements to unpaid annual holiday pay, public holidays or alternative holidays was impacted by the limited records he was provided. Due to lack of engagement from WLS, Mr Martin has been required to initiate these proceedings. In these circumstances, I order that the full amount of the penalty should be paid to Mr Martin, being $6,000.

Summary of outcome

[85] I have found:

a. Eddy Martin was a permanent employee of Wellington Laundry Services Limited;
b. Eddy Martin's resignation should be treated as an unjustified constructive dismissal due to breaches of duty by Wellington Laundry Services Limited in its responses (communicated by Peter George) to Mr Martin's questions about payment arrangements in late 2020 and Mr Martin's request to take leave to deal with a medical issue in January 2021, leading to it being foreseeable that Mr Martin would resign;
c. Wellington Laundry Services Limited were not able to pay Eddy Martin annual holiday pay on a pay as you go basis, as they have failed to comply with s 28(1)(b) of the HA2003;

[14] Ibid at [173].

d. Wellington Laundry Services Limited have not correctly accounted for Eddy Martin's public holidays entitlements under the HA2003;
e. Wellington Laundry Services Limited have failed to comply with the wages and time records requirements in s 130 of the Act and the holiday and leave record requirements of s 81 of the HA2003, and failed to provide complete records to Eddy Martin when requested; and
f. Eddy Martin's claims for unpaid wages, sick leave and bereavement leave are not made out.

[86] For the above reasons I order Wellington Laundry Services Limited to pay Eddy Martin:

a. compensation in the amount of $20,000 without deduction under s 123(1)(c)(i) of the Act;
b. $4,781.87 for unpaid annual holiday pay;
c. $1,459.98 for five unpaid alternative holidays and four unpaid public holidays not worked which would otherwise be a working day; and
d. $6,000 being a penalty under s 130 of the Act and s 75 of the HA2003.

Costs

[87] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[88] If they are not able to do so and an Authority determination on costs is needed, reflecting the above comments Mr Martin may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum WLS would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[89] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[15] As the investigation meeting for this matter took just under half a day, my preliminary view is that half of the notional daily rate is the appropriate starting point for a determination of costs.

[15] See www.era.govt.nz/determinations/awarding-costs-remedies.

[90] Finally, I note that while Mr Martin's representative acknowledged that for part of the process of this matter Mr Martin has been legally aided, he will likely be required to pay his legal aid debt.

Shane Kinley
Member of the Employment Relations Authority