

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 69/08  
509 4001

BETWEEN                      BRENT KENRICK POWNALL  
   Applicant  
  
AND                              FAIRBROTHERS  
   INDUSTRIES LTD  
   Respondent

Member of Authority:      Yvonne Oldfield  
  
Representatives:            Mr Pownall in person  
   Mr James Fairbrother, director, and Mr Dennis Steele,  
   Financial controller, for respondent  
  
Investigation Meeting:      21 January 2008  
  
Further information  
received:                      24 January and 15 February from Respondent, 25  
   January from Applicant  
  
Determination:              29 February 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Pownall was employed by the respondent as General Manager from August 2005 until the summer of 2006/2007 when his position was terminated as a result of redundancy. He and Mr Fairbrother negotiated an exit agreement (said to be pursuant to s.149 of the Employment Relations Act) and executed it on 22 January 2007. Both had the benefit of professional advice at the time of entering into this agreement.

[2] Relevant terms of the settlement agreement included the following:

*“3. The Employee’s employment shall cease on 1 February 2007, by reason of redundancy.*

...

*5. The Employer shall pay to the Employee by direct credit...on 28 February 2007 the sum of \$9583.33 gross and... on 31 March 2007, \$9583.33 gross and ...on 30 April 2007 \$9583.33 gross these sums in total being three months salary in lieu of notice.”*

[3] These three instalment payments met Mr Pownall’s pre-existing entitlements to three months pay in lieu of notice, set out in his employment agreement as follows:

*“13.1 Either party may terminate this Agreement by giving the other three months notice in writing.*

*13.2 The Employer reserves the right to pay the Employee in lieu of that notice...”*

[4] I was told by Mr Fairbrother and by the respondent’s Financial Controller, Mr Steele, that the instalment arrangement was agreed because cash flow difficulties prevented the respondent from paying the final pay, settlement payment, and pay in lieu of notice all together upon the termination of employment on 1 February 2007.

[5] There is no dispute that the agreement addressed the issue of the termination of the employment, or that Mr Pownall received all the payments which were set out in the terms of settlement.

[6] The reason Mr Pownall has now come to the Authority is that he says that upon termination on 1 February he received outstanding wages but not outstanding holiday pay. It is a further relevant term of Mr Pownall’s employment agreement that he was entitled to a fourth week of annual leave:

*“7.1 Annual holidays shall be allowed and paid in accordance with the Holidays Act 2003 ... the Employee’s specific entitlement being four weeks per annum.”*

[7] Mr Pownall now claims 8% holiday pay on his earnings up to 1 February as well as on the pay in lieu of notice which was paid out after the date of termination.

[8] Mr Steele and Mr Fairbrother did not dispute the respondent's obligation to pay outstanding wages and holiday pay upon the termination of the employment (Mr Steele told me he thought this had been done at the time.) However they say holiday pay should attach only to wages to 1 February and dispute any obligation to pay holiday pay on the payment in lieu of notice. Mr Fairbrother says that Mr Pownall can have no further claim on the respondent after 1 February. No term of the settlement agreement addressed the issue of holiday pay directly but he relies on the fact that the agreement between them was in "*full and final settlement of all matters between the parties relating to their employment relationship.*"

[9] The issues for determination are therefore:

- i. Whether payments in lieu of notice would normally be part of "gross earnings" for the purposes of calculating holiday pay;
- ii. What was covered by the settlement agreement, and
- iii. What if any holiday pay remained outstanding at the end of the employment.

**(i) Are payments in lieu of notice gross earnings for the purposes of calculation of holiday pay?**

[10] Section 14 of the Holidays Act 2003 ("the Act") provides:

***"Meaning of gross earnings***

*In this Act, unless the context otherwise requires, **gross earnings**, in relation to an employee for the period during which the earnings are being assessed,—*

*(a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—*

*(i) salary or wages:*

*(ii) allowances:*

*(iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, or bereavement leave taken by the employee during the period..."*

[11] Clauses 13.1 and 13.2 of the employment agreement specifically require the provision of three months' notice or payment in lieu of that notice. Payment in lieu of notice is therefore a payment "*that the employer is required to pay to the employee under the employee's employment agreement*" in terms of s.14 of the Act. The timing of the payment, albeit by agreement, does not change the fact that there is a contractual obligation to pay it.

[12] The payments in lieu of notice are therefore gross earnings for the purposes of calculation of holiday pay.

**(ii) What was covered by the settlement agreement?**

[13] It is not the respondent's position that the use of the words "full and final settlement" disentitled Mr Pownall to his final pay (being unpaid wages for the period to 1 February and the balance of holiday pay accrued on that date.) Mr Fairbrother and Mr Steele say however that because the payment in lieu of notice was deferred until after the end of the employment it was not part of that final pay. They also say that because the settlement was "full and final" Mr Pownall is not now entitled to pursue a claim for 8% of that pay in lieu of notice.

[14] The respondent's position is inconsistent and cannot be sustained. If holiday pay obligations remained at all they remained in their entirety. Since such obligations have been conceded it follows that the settlement agreement does not cover holiday pay.

**(iii) Quantum owed**

[15] After a meeting with the parties and an exchange of information I concluded that the only accurate way of determining what holiday pay Mr Pownall might be owed was to inspect the wage and time records for the entire period of his employment (15 August 2005 to 1 February 2007) and compare what he was paid to what he should have been paid.

[16] No leave records had been kept. I therefore rely on the recall of the witnesses as to what holidays Mr Pownall took. Over the first Christmas of his employment he was

off work from 23 December 2005 to 9 January 2006. The next year he was away from 21 December 2006 until 15 January 2007. He also took a day at some stage during 2006 to make a long weekend. Total annual leave used during the employment was therefore 19 days (six days over Christmas 2005, 1 day during 2006 and 12 days over Christmas 2006.)

[17] Pay records were duly produced to me and were not disputed. Excluding the deferred payments in lieu of notice, this is what Mr Pownall was paid during his employment:

<b>Period 1: 15/08/05 to 31/03/06</b>	
• 32 weeks at \$2,019.23 per week:	\$64,615.37
• one additional week of “holiday pay”:	<u>\$2,019.23</u>
<b>Total:</b>	<b>\$66,634.60</b>

<b>Period 2: 2/04/06 to anniversary of employment, 13/08/06</b>	
• 19 weeks at \$2,211.54 per week	<b>\$42,019.26</b>

<b>Period 3: 13/08/06 to 1/2/07</b>	
• 21 weeks at \$2,211.54 per week;	\$46,442.34
• Final part week’s pay	\$1,326.92
• 20 days “holiday pay”	\$8,846.21
• Four days “stats”	<u>\$1,769.23</u>
<b>Total</b>	<b>\$58,384.70</b>

[18] Combining the totals for these three periods gives us a figure of **\$167,038.56** paid to Mr Pownall during the entire period of employment. Subsequently he was also paid the deferred payment in lieu of notice.

[19] As for what he should have been paid (what was payable) there is no dispute that Mr Pownall’s rate of pay was agreed at \$2019.23 per week for the 32 calendar weeks until the end of the financial year, 2006. After that he was to be on \$2,211.54

per week up to the end of his employment (43 calendar weeks and three days.) He was therefore entitled to salary of:

<b>Wages payable</b> (15 August 2005 to 1 February 2007)	
• 32 weeks at \$2,019.23 per week	\$64,615.36
• 43 weeks at \$2,211.54 per week	\$95,096.22
• 3 days at \$442.30	\$1326.90
<b>Total</b>	<b>\$161,038.48</b>

[20] Turning now to entitlements to annual leave and holiday pay, the relevant sections of the Holidays Act 2003 provide:

***“24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen***

*(1) Subsection (2) applies if-*

- (a) the employment of an employee comes to an end; and*
- (b) the employee is entitled to annual holidays, and*
- (c) the employee has not taken annual holidays or has taken only some of them.*

*(2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of-*

- (a) the employee’s ordinary weekly pay as at the date of the end of the employee’s employment;<sup>1</sup> or-*
- (b) the employee’s average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee’s employment*

***“25 Calculation of annual holiday pay if employment ends before further entitlement has arisen***

*(1) Subsection (2) applies if—*

- (a) the employment of an employee comes to an end; and*
- (b) the employee is not entitled to annual holidays for a second or subsequent 12-month period of employment because the employee has not worked for the whole of the*

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<sup>1</sup> Mr Pownall was on salary and had received a pay increase at the end of the 2005/2006 financial year so subsection (2) (a) is for him the greater of the two rates.

*second or subsequent 12 months for the purposes of section 16.*

*(2) An employer must pay the employee [8%] of the employee's gross earnings since the employee last became entitled to the annual holidays, less any amount—*

*(a) paid to the employee for annual holidays taken in advance; or*

*(b) paid in accordance with section 28.”*

“26        ***Payments may be cumulative***

*To avoid doubt,-*

*(a) gross earnings for the purposes of section 25 (2) includes any payments under section 24 (2)*

*(b) an employee may be entitled to payments for annual holidays under both section 24 and section 25.”*

[21] Since Mr Pownall’s redundancy occurred part way through his second year of employment his annual leave and holiday pay entitlements are arrived at by applying sections 24 and 25 in turn, and totalling them as provided for in s.26.

[22] Applying s. 24 (2) (a) we see that on the anniversary of his employment (15 August 2006) Mr Pownall had become entitled to 20 days annual leave. By the end of his employment he had taken 19 of these 20 days. On termination he was therefore entitled to the balance of this leave: one day’s holiday pay at his current rate of pay. This amounted to **\$442.30**.

[23] Applying s.25 of the Act we see that Mr Pownall was entitled to a further 8% of his gross earnings from the date of the anniversary, 15 August 2006. As set out in s.14 of the Act, gross earnings include all salary payable (for a period of 24 weeks and three days in this case, inclusive of time on annual leave pursuant to s.26 (b)) and payment in lieu of notice.

[24] Mr Pownall’s entitlement pursuant to s.25 is therefore calculated as follows:

<b>Gross earnings after anniversary:</b>	
<ul style="list-style-type: none"> <li>Wages payable for 24 weeks and three days at a weekly rate of \$2,211.54</li> <li>payment in lieu of notice</li> </ul>	<p>\$54,403.88</p> <p><u>\$28,749.99</u></p>
<b>Total</b>	<b>\$83,153.87</b>
<b>8% of this:</b>	<b>\$6,652.31.</b>

[25] Mr Pownall is therefore entitled to holiday pay of **\$6,652.31** pursuant to s.25.

[26] Excluding the payment in lieu of notice which was deferred by agreement, but including all other contractual and statutory entitlements we see that by the end of his employment Mr Pownall should have been paid, in total:

Wages payable for entire period, 15/08/05-1/2/07	<b>\$161,038.48</b>
Balance of leave entitlement pursuant to s.24	<b>\$442.30.</b>
8 % holiday pay pursuant to s.25	<b>\$6,652.31.</b>
<b>Total</b>	<b>\$168,133.09</b>

[27] Mr Pownall is owed the difference between what he should have been paid (**\$168,133.09**) and what he was paid (**\$167,038.56.**) That is the sum of **\$1,094.53**.

**[28] The respondent is ordered to pay to the applicant the sum of \$1,094.53 gross arrears of holiday pay.**

Yvonne Oldfield

Member of the Employment Relations Authority