

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 138
3018539

BETWEEN PETER READER
Applicant

A N D GRAYS TRANSPORT NZ
LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: M Revell, Counsel for the Applicant
C Davis, Director for the Respondent
Investigation Meeting: On the papers
Submissions Received: 28 March 2018 from Applicant
11 March 2018 from Respondent
Date of Determination: 3 May 2018

DETERMINATION OF THE AUTHORITY

- A. I order Grays Transport New Zealand Limited to pay Peter Reader wage arrears and holiday leave of \$11,200 gross less PAYE within 7 days of this determination.**
- B. I order Grays Transport Limited to pay \$2,000 to the Ministry of Business Innovation and Employment Bank account within 28 days of the determination.**
- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment Relationship Problem

[1] The Authority issued an earlier determination about liability for wages and dismissed a personal grievance of unjustified dismissal and a counterclaim.¹ The Authority found Mr Reader was owed annual leave of 10 days and 8 % of his gross wages for the period 23 May 2016 until 28 March 2017 and public holiday of 2 days in lieu and unpaid salary for 19 to 28 March 2017.

[2] At hearing an issue arose about his wages for the period 25 December 2016 to 28 March 2017 being less than the applicable minimum wage. I allowed the parties an opportunity to present further submissions about the issue before determining quantum given the possibility of an increase in wages owed and the effect it may have in calculating the final amounts of holiday pay owed. The issue of penalties also remained extant.

[3] This determination deals with all of the remaining issues.

Other matters

[4] The respondent has sought to re-litigate the wages and leave owed and to raise an alleged overpayment of \$6,000.² The issue of wages and leave has been resolved. There is no evidence that supports any miscarriage of justice by the earlier determination. If the respondent seeks to recover any overpayment it should file a separate statement of problem and pay the appropriate filing fee. That matter can then be dealt with separately.

Minimum Wage

[5] The minimum wage issue arose because the base salary (exclusive of allowances) paid for the hours worked for the period 25 December 2016 to 28 March 2017 was less than the applicable adult minimum wage.

[6] Mr Davis for the respondent confirmed that another company DCM Limited (owned by his mother in law) paid Mr Readers salary because the truck he operated belonged to it. He further submitted Mr Reader's salary was always paid inclusive of the non-taxable allowances. DCM had increased the allowances and reduced Mr Reader's salary without any input from the respondent. Mr Davis confirmed Mr

¹ *Peter Reader v Grays Transport Limited* [2018] NZERA Auckland 75.

² Email 11 March 2018 C Davis to ERA.

Reader has been receiving the same monetary amount each week even when he was absent from work.

[7] The non-taxable allowance was an overnight accommodation allowance. These are generally paid when an employee is required to stay overnight away from their home base. From the payslips the same amount of non-taxable allowance was paid each week irrespective of the number of nights spent away from Mr Reader's home base. It was also paid when he was on leave. From the evidence over time it had ceased being an allowance and became part of his salary.

[8] The parties' employment agreement provided a base gross salary of \$65,520 gross together with a non-taxable overnight allowance of \$7,280. Mr Reader received a total salary of \$72,800 gross per annum. This equates to \$2,800 per fortnight or \$35.00 gross per hour for a 40 hour week. If he worked more than 40 hours per week this may fall below the applicable minimum wage. He has not provided any evidence this occurred. Therefore no issue regarding payment below the minimum wage arises.

[9] The tax arrangements between the respondent, DCM and IRD are different issues. If the respondent or DCM have paid less tax then it was required to deduct, that is a matter for it to resolve with IRD.

Quantification of wages and holiday pay

Wages

[10] Given the above findings, the unpaid salary for 19 to 28 March 2017 totals \$2,800 gross less PAYE.

Holiday pay

[11] Mr Readers ordinary (and average) weekly earnings for the 12 months prior to his employment ending was \$1,400 gross. He is owed 10 days or two weeks annual leave. This equates to \$2,800 gross.

[12] His gross wages for the period 23 May 2016 until 28 March 2017 (45 weeks) was \$63,000. 8% of \$63,000 is \$5,040 gross.

Alternative Public holiday leave

[13] Mr Readers relevant daily pay was \$280 gross. He was entitled to 2 alternative days for working on a public holiday. He is therefore entitled to \$560 gross.

Order

[14] I order Grays Transport New Zealand Limited to pay Peter Reader wage arrears and holiday leave of \$11,200 gross less PAYE within 7 days of this determination.

Penalties

[15] There was no application for penalty in the statement of problem dated 28 August 2017. Penalties were sought at the telephone conference on 24 January 2018 in respect of the following breaches:

- a) Inaccurate holiday leave records pursuant to s.81 of the Holidays Act 2003;
- b) Inaccurate wage and time records pursuant to s.135 of the Employment Relations Act 2000;
- c) Breaches of good faith by the employer's repeated failure to supply copies of the above records in response to requests to do so;
- d) Breaches of good faith by the employer's actions in respect to requests for flexible working arrangements.

[16] I directed the parties file submissions about the penalty. The applicant's submissions were filed on 28 March 2018. The respondent did not file any submissions about penalty.

Inaccurate leave records s81 Holidays Act 2003 (HA)

[17] Non-compliance by employers with s81 HA may result in a penalty of up to \$20,000 per breach in respect of a company. The holiday leave record produced did not comply with the requirements of s81 HA. There has been a breach of s81 HA.

Inaccurate wage and time records

[18] Non-compliance with s130 ERA in terms of the requirements for wage and time records may result in a penalty being awarded under s130(4) ERA. I understand the wage and time records are Mr Reader's payslips only. The respondent submits any other detail is in the possession of DCM whom paid the applicant's wages and PAYE. The payslips only recorded the wages paid each week but little else.

[19] The respondent as Mr Readers employer is required to keep a wage record that complies with s130 ERA. The wage record produced does not meet the requirements of s130 ERA. The fact the wage record was kept by another company does not deflect the respondent's legal obligations. There has been a breach of s130 ERA.

Breaches of good faith by repeated failure to supply wage and leave records

[20] Good faith obligations under s4 ERA only exist during the employment relationship. The request for the wage and leave record occurred following termination. There can be no breach of good faith at that stage. This penalty application is dismissed.

Breaches of good faith regarding flexible working relationship request

[21] There was evidence the respondent did consider Mr Readers request for "flexible runs" as opposed to fixed runs to accommodate his medical treatment. They were unable to do so because the truck he operated was more suited to fixed not floating runs. The head contractor also had safety concerns about Mr Reader continuing to drive fixed runs while receiving treatment. His treatments were in Palmerston North. He was at times required to drive from Wellington to Palmerston and back to collect a truck in Wellington to be driven to Auckland.

[22] There is no evidence the respondent did not act in good faith regarding Mr Reader's request. He was made aware of the respondent's inability to give him floating runs and the Head contractors concerns. I dismiss the application.

Quantum of Penalty

[23] Given there are two proven breaches of the ERA and HA I must consider s133A ERA by virtue of s135 ERA and 76A HA. Because this involves more than

one breach of “minimum code” legislation I am also required to consider the methodology set out by the Court in the decision of *Preet*³.

[24] The breaches appear to be negligent but not intentional. Aggravating factors are the losses suffered as a result of the inaccurate wages and holiday leave record are the wages of \$11,200 gross. This has yet to be paid. Mr Reader was vulnerable in having to rely upon his employer to maintain accurate records. Mitigating factors are the breaches have occurred as a result of DCM’s defective record keeping. The respondent relied upon it to meet the legislative requirements. Mr Davis gave evidence about the company’s precarious financial position. The impression I gained from the evidence was although the company was not insolvent it was not far from becoming so.

[25] In similar cases where there have been similar breaches of minimum code the Authority has awarded per breach the sum of \$500 (for a single breach) to \$2,000 (\$4,000 total for two breaches).⁴ I intend awarding the amount of \$1,000 per breach here or \$2,000 in total.

[26] I see no evidential basis to make payment to Mr Reader. Although he may have suffered stress the purpose of a penalty is to punish bad behaviour. Penalties are not designed to increase compensation for hurt and humiliation.

[27] I order Grays Transport Limited to pay \$2,000 to the Ministry of Business Innovation and Employment Bank account within 28 days of the determination.

[28] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

³ *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Tobacco Ltd* [2016] NZEmpC 143.

⁴ *Allu v Sahana Inz Ltd and Anor* [2017] NZERA Auckland 368; *Kirsty Gallagher v Capital Osteopaths Limited* [2017] NZERA Wellington 126.