

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 119  
3041051

BETWEEN                      SAMUEL VAN DER WEERDEN  
Applicant

AND                              STINGZ LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Meghan Zetko, Counsel for the Applicant  
No appearance on behalf of the Respondent

Investigation Meeting:      31 January 2019 at Dunedin

Submissions Received:      On the day

Date of Determination:      4 March 2019

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**DETERMINATION OF THE AUTHORITY**

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- A        Within 28 days of the date of this determination Stingz Limited is ordered to pay to Samuel van der Weerden the sums of:**
- (i)        \$221.20 gross being unpaid wages.**
  - (ii)       \$397.51 gross being holiday pay.**
  - (iii)      The sum of \$21.70 being interest from the last date of employment to the date of this determination.**
- B        Within 28 days of the date of this determination Stingz Limited is ordered to pay a penalty in the sum of \$2,500 as follows:**
- (i)        \$833.33 of the penalty is to be paid to Samuel van der Weerden.**
  - (ii)       The balance of the penalty which is \$1666.67 is to be paid into the Authority to then be paid into the Crown bank account.**

**C There is no award for costs but Stingz Limited is ordered to reimburse Mr van der Weerden for the filing fee of \$71.56.**

### **Employment Relationship Problem**

[1] Mr van der Weerden commenced employment with Stingz Limited (Stingz) on a part-time basis when he was in his final year of High School in 2016. He carried on working for Stingz during his first year at University in 2017 undertaking between 3 - 5 hours work each week. In 2018 after obtaining a new job he tendered his resignation on 15 February 2018.

[2] He says that he was not paid wages that were due and owing to him for 14 hours of work performed over January and February 2018 and that he has never received paid holidays or holiday pay.

[3] A number of text messages were sent to the sole director of Stingz, Judianne Sleeman, asking for payment of the unpaid wages. Ms Sleeman responded by text on a few occasions and promised payment. Payment was not forthcoming.

[4] On 18 May 2018 there was a text message from Ms Sleeman to Mr van der Weerden thanking him for his patience and advising that the wages would be available Monday morning. Wages were still not paid and shortly thereafter Mr van der Weerden went to the Community Law Centre for assistance in recovering what was owed to him. The Community Law Centre continued to try to obtain payment on Mr van der Weerden's behalf but despite demand no payment was forthcoming.

[5] Mr van der Weerden seeks recovery of arrears of wages for 14 hours work at \$15.80 per hour in the sum of \$221.20 gross and holiday pay.

[6] He also seeks interest on the amounts owing to him.

[7] Mr van der Weerden says that there were breaches of the Employment Relations Act 2000 and the Holidays Act 2003 and he seeks penalties for those breaches.

### **No participation by Stingz**

[8] Stingz has its registered office in Dunedin and operates a gift shop. It has failed to take an active part in this matter and was not represented at the investigation meeting.

[9] Extensive attempts from an early stage to contact Ms Sleeman by the Authority officer are apparent from the administration file. I am satisfied that the original statement of problem was served on Stingz at its registered office.

[10] The Authority officer made attempts to obtain a statement in reply. Stingz was provided with a letter by courier about attending the Authority case management conference including the time and date of that conference.

[11] Ms Sleeman was unable to be contacted on the date of the Authority case management conference and the Authority therefore proceeded in her absence on 30 November 2018 to talk to Ms Zetko and progress the matter.

[12] During the case management conference the Authority directed that Stingz provide copies of Mr van der Weerden's time and wage records and holiday and leave records for the period of his employment. This information was to be provided by no later than 20 December 2018. No records have ever been received. The Authority also clarified with Ms Zetko a claim for exemplary damages in the original statement of problem. Ms Zetko confirmed that this was in fact a claim for penalties and an amended statement of problem was then lodged with penalties claimed. The Authority set the matter down for an investigation meeting in Dunedin on 31 January 2019.

[13] The Authority officer records on the file that he received a telephone call from Ms Sleeman the week of 3 December 2018 advising that the money had been paid to Mr van der Weerden and that she would be *sending documents*. Mr van der Weerden was duly advised by the Authority officer to check his bank accounts but said that no money had been received. There were no documents lodged with the Authority by Stingz.

[14] I am satisfied that the notice of direction from the case management conference, amended statement of problem and notice of investigation meeting was served on Stingz at its registered office. It was also confirmed by Track & Trace that the documents were picked up and signed for by Ms Sleeman on 14 December 2018.

[15] There was no appearance on behalf of Stingz on 31 January 2019 at the investigation meeting and no good reason advised for that non-appearance. The Authority proceeded to hear evidence from Mr van der Weerden about his claim under clause 12 of Schedule 2 of the Employment Relations Act 2000.

## **The issues**

[16] The Authority needs to determine the following issues:

- (a) What arrears of wages are owing;
- (b) Does Stingz owe holiday pay to Mr van der Weerden?
- (c) Should interest be awarded to the applicant on any amounts owing?
- (d) Were there breaches of the Employment Relations Act 2000 and Holidays Act 2003 and if so, should penalties be imposed?

## **Arrears of wages**

[17] Mr van der Weerden in his evidence confirmed that he was owed a gross sum of \$221.20 for unpaid wages and that amount remained outstanding at the date of the Authority investigation meeting.

[18] I accept that Mr van der Weerden is owed the sum of \$221.20 gross being 14 hours undertaken on four Fridays in 2018 at his hourly rate of \$15.80. Despite demand I find that it remains unpaid.

[19] I order Stingz Limited to pay to Samuel van der Weerden the sum of \$221.20 gross being arrears of wages.

## **Holiday pay**

[20] Ms Zetko provided an assessment of holiday pay owing from online payslips that Mr van der Weerden had been able to obtain for financial years 2016 – 2017 and from 31 March 2017 showing the last pay date as 15 December 2017.

[21] The year to date gross wages in the online payslips accords with earning information the Authority was supplied with for Mr van der Weerden from the Inland Revenue Department from 1 April 2016 – 31 March 2017 and from 1 April 2017 to 31 March 2018.

[22] Ms Zetko has assessed holiday pay on the basis that the payslips are not comprehensive and from 19 May 2016 – 9 March 2017 show pay for one week only each fortnight. Ms Zetko doubled the earnings for that period as Mr van der Weerden worked every week. I am not satisfied that is as straightforward a matter as that. Each payslip supplied is numbered. There is a box at the head of each slip showing the hours worked by Mr van der Weerden on specific days. Payment appears to have been made in arrears. Payslip number 3 which is the first of the pay slips provided starts on 7 May which is a Saturday and concludes on 13 May 2016 which is a Friday. The next payslip commences on 16 May which is a Monday and concludes on 22 May 2016, a Sunday. The next week commences on 1 June a Wednesday and concludes on 7 June 2016 a Saturday. I cannot rule out, because of the way the payslips are formulated, that the hours and days Mr van der Weerden actually worked were supplied to the payroll provider who undertook payment.

[23] I do agree with Ms Zetko that there is no indication of any paid leave from the payslips.

[24] I find it safer to simply rely on the earnings for the entire period of Mr van der Weerden's employment with Stingz as provided by Inland Revenue and add to those the wages I have found unpaid.

[25] Gross earnings from 1 April 2016 to 31 March 2017 are \$2,956.40. From 1 April 2017 to 31 March 2018 including unpaid wages as found above gross earnings are the sums of \$1791.30 plus \$221.20. \$2,956.40 plus \$1791.30 plus \$221.20 equals \$4,968.90 gross.

[26] Holiday pay should be assessed where there is no evidence of paid leave having been taken on the basis of \$4,968.90 multiplied by 8% which is \$397.51 gross.

[27] I order Stingz Limited to pay to Samuel van der Weerden the sum of \$397.51 gross being holiday pay.

### **Interest**

[28] It is appropriate in a case such as this where an employee has been deprived of the use of money and the employer has had the benefit of that money to make an award for interest.

In this case I consider interest is appropriate from the final day of employment which I am able to ascertain was 23 February 2018.<sup>1</sup>

[29] Under the Interest on Money Claims Act 2016 interest from 23 February 2018 to the date of this determination on the combined amounts of \$397.51 and \$221.68 is \$21.70.

[30] I order Stingz Limited to pay to Samuel van der Weerden the sum of \$21.70.

### **Have there been breaches of the Employment Relations Act 2000 and the Holidays Act 2003?**

[31] When the amended statement of problem was lodged there was a claim for 15 penalties.

[32] Several of those were withdrawn on the basis that Mr van der Weerden did not work public holidays and was therefore not entitled to additional pay or alternative days. It was also accepted that no penalty was available for a default in the payment of wage arrears under s131 of the Employment Relations Act 2000 (ERA).

[33] Section 65(2) of the ERA provides a penalty for a breach of the obligations in that section about the form and content of an individual employment agreement. I accept there was a failure to provide a written employment agreement and therefore a breach of the obligation to provide an employment agreement in writing with the matters included in s 65(2) of the Act.

[34] Section 130(1)(c) of the ERA is about the failure to keep wage and time records that comply with the requirements in that section. I could not be satisfied that Stingz did not keep a wage and time record in accordance with this section. There was on the face of the payroll slips a recording of the days and hours of work undertaken by Mr van der Weerden. His name was recorded as were the wages paid and method of calculation. Although there was a failure to produce the records when asked by the Authority that was not the part of s130 of the Act that was relied on. Even though Stingz Ltd has taken no steps it would be unfair to penalise the company for a penalty that has not been specifically pleaded when another section specifically has.

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<sup>1</sup> See text message from Ms Sleeman to Mr van der Weerden dated 2 March 2018

[35] Section 81(2)(b)(d)(o)and(p) of the Holidays Act 2003 (HA) is about holiday and leave records. No holiday record was produced however on the online payslips there is information showing an annual leave value although it does not equate to the figure I have concluded holiday pay should be assessed on. I agree that there was no clear reference to the date on which Mr van der Weerden's employment commenced and under s81(2)(o) and (p) there was no date of termination recorded and no amount shown as having been paid on termination because there was no payment made. I find that there was a breach of the obligation to keep a holiday and leave record in accordance with s81 and under s 75 of the HA there is a liability for a penalty.

[36] Section 25 of the HA is about calculating and paying annual holidays when employment ends and there is an entitlement to holidays. Section 24 was also alleged to have been breached but I conclude s 25 is probably the applicable one in this circumstance. In any event if not the breaches are indivisible and would be considered as one.

[37] I find there was a breach because of the failure to calculate and pay Mr van der Weerden his holiday pay on termination. Under s75 of the HA there is liability for a penalty. To the extent that there is a suggested breach of s16 of the HA it was unclear what aspect was relied on and I do not find a breach.

### **Number of breaches**

[38] I intend to globalise the two breaches of the HA. In this case the harm occasioned by the failure to keep a holiday and leave record in three aspects under s81 was in reality the failure to pay holiday pay in s25. Assessed on that basis the breaches under the HA are indivisible and I will treat them as one breach. With the breach for the failure to provide an employment agreement therefore this makes the number of breaches two.

### **Maximum penalty**

[39] The maximum penalty is \$20,000 for each of the two breaches or \$40,000.

[40] The amount of the penalty ultimately ordered requires assessment against some statutory considerations in s133A of the Act as clarified by Chief Judge Inglis in *Nicholson v*

*Ford*<sup>2</sup> and additional considerations from the full Court judgment in *Borsboom v Preet PVT Ltd.*<sup>3</sup>

### **Statutory and other considerations**

[41] The Authority is required to have regard to the object of the ERA in s3. The object of the Act is to build employment relations which are productive through the promotion of good faith in all aspects of the employment relationship and environment and this occurs in a variety of ways set out. Materially for this assessment there is an inherent inequality of power between Ms Sleeman and Mr van der Weerden. As a High School student when he commenced employment Mr van der Weerden said he did not really know he was supposed to be provided with an employment agreement and his knowledge about holiday pay was not extensive.

[42] I did not hear from anyone on behalf of the company but I conclude that Stingz clearly knew it owed some money and promised payment through its director both to Mr van der Weerden and Ms Zetko but it was not forthcoming. The company was invited to attend mediation twice to discuss the matter but failed to do so. It has been a legislative requirement for many years that there must be written employment agreements. I do not conclude that the failure to provide an employment agreement and pay holiday pay at the end of employment were unintentional.

[43] As Mr van der Weerden said in his evidence he was not unduly concerned about the fact that he did not have an employment agreement. I do weigh that his age and inexperience as an employee did make him more vulnerable to an imbalance of power in the employment relationship and he did not know to ask for an agreement. Mr van der Weerden has been without the benefit of his holiday pay for about a year and did not have a written employment agreement for the whole of his employment. There has been no attempt to pay holiday pay and mitigate any findings of breach. Stingz has been able to hold onto the money it owed for holiday pay and use it for its own benefit. In that way it has benefitted in a way that other employers who pay holiday pay to employees in accordance with legal obligations have not. The holiday pay was not a large amount of money but significant to a student who wanted to conclude he had been treated properly and in accordance with the HA. There was no evidence to suggest that there has been similar conduct by Stingz but there is a need to award

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<sup>2</sup> *Nicholson v Ford* [2018] NZEmpC 132

<sup>3</sup> *Borsboom v Preet PVY Ltd* [2016] NZEmpC 143, (2016) 10 NZELC 79-072

a penalty that deters future breaches and signals the importance of adherence to employment standards.

[44] For the breach of failing to provide an employment agreement I assess severity at 5% of \$20,000 or \$1000. For the breach of the failure to pay final holiday pay I assess the severity at 15% or \$3000. Whilst not a large sum of money owing the breach is continuing and that is an aggravating factor.

[45] From the starting point for both breaches of \$4000 I have considered whether this is consistent with other cases for two breaches with one employee where the failure to provide an employment agreement did not have a particularly serious impact but there have been a continued failure to pay holiday pay.

[46] Having considered other similar cases I find an appropriate reduction for the failure to provide an employment agreement is \$500. I make no reduction to the penalty for the failure to calculate and pay holiday pay on termination of employment.

[47] There was no financial information provided by Stingz. I asked Mr van der Weerden his view about the financial performance of the shop. He felt that the shop was doing well at the time he left. I make no adjustment to the provisional penalty of \$3,500 because of the financial circumstances of Stingz.

[48] In assessing proportionality of the breaches I find that \$2,500 would be proportionate and just for the less serious impact of the failure to provide an employment agreement and the more serious harm caused by the failure to pay holiday pay. It also reflects the amount of holiday pay owing which is at the lower end.

[49] The total penalty to be awarded is \$2,500 and I will now turn to how that is to be paid.

#### **Should a portion of the penalty be paid to Mr van der Weerden**

[50] Ms Zetko submits that a third of the penalty should be paid to Mr van der Weerden who has been without his holiday pay for at least one year. Although there is an order for payment of holiday pay and interest I accept that there is a possibility without full records for holiday pay there may be a sum still owing. Mr van der Weerden has also had to spend considerable time trying to obtain his holiday pay that should have been paid over a year ago.

[51] I accept that Mr van der Weerden should be paid a portion of the penalty in the sum of \$833.33 as I do not find he will be fully compensated by order for repayment of the holiday pay and interest.

[52] Stingz Limited is ordered to pay to Samuel van der Weerden \$833.33 from the penalty awarded of \$2,500 within 28 days from the date of this determination.

[53] Stingz Limited is ordered to pay to the Authority the balance of the penalty in the sum of \$1666.67 to then be paid by the Authority into the Crown bank account within 28 days.

### **Costs**

[54] Mr van der Weerden was able to use the services of the Community Law Centre to the Authority. He will not be charged but should be reimbursed his filing fee of \$71.56.

[55] I order Stingz Limited to pay to Samuel van der Weerden the sum of \$71.56 being reimbursement of the filing fee.

Helen Doyle  
Member of the Employment Relations Authority