ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 64
3002193

	BETWEEN	MR XYZ Applicant
	AND	WALLBOARD AND INSULATION SUPPLIES NZ LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Philippa Tucker and Kelly Philip, Counsel for the Applicant Andrew Riches, Counsel for the Respondent
Investigation Meeting:	19 February 2018
Submissions received:	At the investigation meeting from the applicant. Further evidence provided on 21 February and 5 March 2018. Submissions from the respondent provided on 6 March 2018
Determination:	11 May 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Within 28 days of the date of this determination, Wallboard and Insulation Supplies NZ Limited must pay Mr XYZ:

(i) $3,948.50 gross in unpaid wages, unpaid sick leave and holiday pay; and

(ii) $4,398.83 in wages and holiday pay lost as a result of the unjustified dismissal.

B. Within 28 days of the date of this determination, Wallboard and Insulation Supplies NZ Limited must pay a penalty of $1,000 for breach of section 130(2) of the Employment Relations Act 2000 to Mr XYZ.

Employment relationship problem

[1] In January 2018, I issued the first substantive determination of these proceedings. In that determination, I found Wallboard and Insulation Supplies NZ Limited (WIS) had unjustifiably dismissed Mr XYZ. I ordered WIS to pay Mr XYZ compensation of $9,600, once his contribution to the situation leading to his personal grievance was taken into account.

[2] Mr XYZ claimed that he is owed unpaid wages and that he was wrongly paid annual leave to compensate for shifts being cancelled. He also claims that WIS should pay a penalty for not supplying wages and time records when requested.[1]

[3] Given that Mr XYZ was unjustifiably dismissed, I also needed to consider whether WIS should reimburse him for any wages lost as a result of his grievance, and if so, how much those lost wages were.

[4] I was unable to resolve the issue of unpaid wages and lost wages in the first determination because of the significant disagreement between the parties about what wages should have been paid during Mr XYZ's employment. Counsel did not have an opportunity to put detailed evidence and submissions on those issues to me at the first investigation meeting.

[1] These claims were added by way of a memorandum of counsel on 26 May 2017.

[5] After the first investigation meeting, counsel requested an opportunity to negotiate and reach agreement on all remedies claimed. They were not able to do so and later provided calculations and submissions on the claim of unpaid wages.

[6] I had arranged a case management conference with counsel on 13 December 2017 to set a date to hear from counsel about how they had calculated what they said was owed. However, Mr Riches was unable to attend due to a family emergency.

[7] I arranged for a continuation of the investigation meeting on 19 February 2018 to hear from counsel about how their calculations of hours worked and amounts owed had been made. Again, unfortunately, Mr Riches was unable to be there, until near the end of the second investigation meeting.

[8] After the continuation of the investigation meeting, I received final submissions from both parties on whether WIS had guaranteed Mr XYZ 40 hours of work a week, and further evidence explaining how calculations had been reached.

The issues

[9] I need to determine:

(i) Should I impose a non-publication order on Mr XYZ and his partner's names and cause the first determination to be taken down off the Employment Law Database?

(ii) Was Mr XYZ generally entitled to be paid for a minimum of 40 hours of work a week? If so, at what rate should Mr XYZ have been paid for hours that were not spent installing?

(iii) Is Mr XYZ owed any unpaid wages?

(iv) What amount of wages did Mr XYZ lose due to his personal grievance?

(v) Should WIS be penalised for a failure to supply wages and time records in a timely way pursuant to s 130(2) of the Employment Relations Act 2000 (the Act)?

Should Mr XYZ's name be supressed?

[10] The first determination in these proceedings was published on 10 January 2018. Mr XYZ and his partner were both named. The determination had relatively widespread publicity on the Stuff website. Mr XYZ gave evidence that he remained out of work as at 19 February 2018 and that he fears that the publication of his name has made prospective employers wary of employing him. He gave evidence that he had an interview for a new job since the publicity and had been asked questions about his attitude to health and safety. He did not get that job and thinks the questions were related to that employer having looked his name up on-line and finding my determination, or reports of it on Stuff.

[11] Mr XYZ said that the publicity also had a negative effect on his partner who was embarrassed that her name and their private domestic and family concerns had been made public.

[12] Ms Tucker made submissions that I should consider suppressing Mr XYZ's name in this second determination, and that I should cause the first determination to be taken down from the Employment Law Database and order Stuff to not publish Mr XYZ's name.

[13] The starting point for the administration of justice is that it is generally undertaken in public. The Authority is no different from courts in that regard.

[14] There are situations in which the Authority may order non-publication of names and/or certain specific details. The jurisdiction to do so is set out in clause 10, Schedule 2 of the Employment Relations Act 2000. However, no application was made for Mr XYZ's name not to be published before I issued my first determination. In addition, at the time, there were no matters drawn to my attention that would have led to a non-publication order being made.

[15] WIS opposes a non-publication order on this determination. It submits that if Mr XYZ is not named in this determination there is a risk of suspicion falling on other previous WIS employees. It also says that unlike in the first determination there is no risk of private

information of non-parties being put into the public arena, therefore the considerations in *X v Y*[2] do not apply.

[16] I cannot remedy any negative effects that have already been caused to Mr XYZ and his partner from the widespread publicity that there has already been. It is, of course, unfair of any prospective employer to form a negative view of a potential employee simply because he has used his legal right to pursue a claim of unjustified dismissal.

[17] I cannot cause the reports already on the internet, for example on Stuff, to be taken down. I do not have that jurisdiction. Given that limit in my jurisdiction, even were I to be able to cause the text of my determination to be removed from the Employment Law Database, where the determination can be accessed, I would not do so. If a prospective employer searched Mr XYZ's name and came across Stuff reports they would also come across the link to the website where the determination can be accessed. I consider that if a fair-minded prospective employer read the full determination, as opposed to simply reading a Stuff report, any potential negative view of Mr XYZ could be mitigated by the full facts of the case.

[18] However, I accept that if Mr XYZ's name is published in this determination there is a risk of news outlets picking it up and linking it to the first determination, and therefore publicising the details, including Mr XYZ's partner's name all over again.

[19] I do not consider that there is any real risk of other previous WIS employees being suspected if Mr XYZ's name is not published in this determination. However, in publishing his name there is a real risk of causing further humiliation to Mr XYZ and to his partner.

[20] Therefore, I prohibit from publication Mr XYZ's real name and that of his partner and any information that could identify either of them.

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[2] [2016] NZERA Auckland 345

Did WIS guarantee Mr XYZ 40 hours of work per week?

[21] The parties differ totally on their interpretation of the individual employment agreement (IEA), in particular, on whether WIS guaranteed Mr XYZ 40 hours of work every week.

[22] The agreement began on 8 December 2014. The relevant parts of it are:

> **2. Classification of Employment**
> The Employee is employed on a full time basis for at least 40 hours per week as set out in the Schedule.
>
> **5.2** A minimum of 40 hours per week is expected to be achieved by the Employee. Additionally, the Employee's duties will of necessity involve the Employee in extended hours from time to time so that the Employee may successfully sustain and promote the operation of the Company, this may include working during the course of the weekend.
>
> **36. SCHEDULE – INSTALLATION CREW**
>
> **Pay Rate:** Per Square Metre Rate
> Hourly rate for Travel/Training/Other duties carried out.
>
> | | |
> |---|---|
> | Ceiling bulk insulation | $1.00 per square metre |
> | Wall bulk insulation | $1.00 per square metre |
> | Ceiling retro bulk insulation | $1.20 per square metre |
> | Commercial | $20 per hour |
>
> (Timesheets to be submitted weekly)
> For other tasks performed by staff not assigned at square metre rates such as rubbish removal/Travel
>
> | | |
> |---|---|
> | Full Driver's Licence | $16.00 per hour |
> | Deliveries/training | $20.00 per hour |
>
> **Time and Hours of Work:**
> Your hours and days of work shall be set and offered at the employer's sole discretion and shall be advised to you in advance as far as practicable. You understand and accept that the days of work and the number of hours may change. You understand and accept that no days or hours are guaranteed and that work shall only be offered as and when it is available. Although normally commencing at 6.00am to 5.00pm as directed by Employer.
>
> **Sign off Fee:** $25 per residential dwelling to be paid to team leader. Or to be split as stated on the job card by the Team Leader.

[23] Ms Tucker submitted that when the IEA is read as a whole, and considered together with WIS' practice of generally paying employees for a minimum of a 40-hour week, WIS did guarantee that it would supply 40 hours of work a week.

[24] WIS says that 40 hours of work a week was not guaranteed. It relies on the Time and Hours of Work provision in the Schedule. WIS submits that when clause 5.2 and the Schedule are considered together, Mr XYZ was required to make himself available for a minimum of 40 hours work per week, although WIS did not guarantee that number of hours.

[25] The IEA provisions are not consistent with one another. There is ambiguity between clauses 2 and 5.2 and the Time and Hours of Work provision. Therefore, I need to interpret the agreement to ascertain its meaning. Contractual interpretation principles apply to all contracts, including employment agreements. Generally, an objective view must be taken of what the contract means, not the subjective views of the parties on what they intended the contract to mean. However, in cases of ambiguity aspects outside of the contractual words may be referred to, to ascertain meaning. According to the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Limited*[3]:

> [29] It is often said in contract interpretation cases that evidence of surrounding circumstances is admissible. Circumstances which surround the making of the contract can operate both before and after its formation.
> …
>
> [31] There is no logical reason why the same approach should not be taken to both post-contract and pre-contract evidence. The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear.

[26] In order to ascertain what the IEA meant in terms of hours of work I need to look outside of the words of the agreement. I refer to Tracy Ann Cook's evidence of post-contract practice. Ms Cook administered the WIS payroll. She gave sworn evidence at the first

[3] [2010] NZSC 5

investigation meeting. Her evidence was that when an installer is installing their hourly rate, paid on a per metre basis, is greater than the $16 per hour rate set out in the IEA. She said that when she was making up the pays she checked each week to make sure that, if possible, an installer was never paid less than $16 x 40 hours a week.

[27] Ms Cook on WIS's behalf checked each week that Mr XYZ, barring any unpaid non-attendance at work, was paid for a minimum of 40 hours a week at a minimum of $16 per hour. That shows that generally WIS considered Mr XYZ was entitled to receive pay for a minimum of 40 hours per week. That practice makes it clear that WIS treated Mr XYZ as if he was employed as a 40-hour a week worker.

[28] I consider that the IEA can also be read to mean that WIS could ask Mr XYZ to work for more than 40 hours and could be required to work some of his 40 hours outside of 6 am to 5 pm, which were the normal hours of work.

[29] The employment agreement required WIS to provide a minimum of 40 hours work a week to Mr XYZ. Therefore, the 'zero hours' provisions that came into effect on 1 April 2016 did not apply to Mr XYZ's employment.

[30] In addition, to pay at either an hourly rate or a per metre rate, Mr XYZ was entitled to be paid sign-off fees. I note that both parties calculated the sign-off fees as if they contributed to the 40 paid hours per week. However, I find that the sign-off fees were intended to be paid in addition to the hours worked.

What, if anything more, is Mr XYZ owed for his work prior to his dismissal?

[31] WIS did not keep timesheets recording Mr XYZ's every hour of work on each day. What it has been able to supply is payslips for each week and work sheets for the days in which installation work was done showing how many hours that work took. It also supplied some time sheets for weeks during the latter part of Mr XYZ's employment and some calendar notes from that same period.

[32] Section 130(1)(g) of the Act requires employers to record the "numbers of hours worked each day in a pay period". I do not consider WIS's records overall complied with that requirement. For example, hours that Mr XYZ may have spent in paid work other than installation, such as loading and unloading the vans and tidying up the work sites, were not recorded in writing every day in a time record. That has made the accurate calculation of wages owed difficult.

[33] Section 132 of the Act provides that if the employer fails to keep or provide a wages and time record and that failure prejudiced the employee's ability to bring an accurate claim I could have accepted Mr XYZ's wage claims as proved. However, WIS has provided some evidence to show that some of Mr XYZ's claims were incorrect. For example, I do not accept Mr XYZ's claims that amount to an argument he should have received more paid sick leave than his statutory entitlement.

[34] In addition, although annual leave entitlement was recorded on each weekly pay slip it appears WIS did not keep holiday and leave records that were an up to date running total of other leave taken and the balance of, for example, sick leave left.

[35] Both parties' counsel studied the work sheets and payslips WIS supplied. Both created spreadsheets showing days worked, hours worked per week and leave taken, whether paid or unpaid. However, since both parties proceeded to do their calculations with different underlying assumptions they reached markedly different numbers.

[36] Mr XYZ's counsel submits he was underpaid by either $13,704.68 or $11,979.37 gross, including holiday pay of 8%.

[37] As set above, WIS's counsel submitted that the IEA required Mr XYZ to make himself available for 40 hours per week but did not guarantee him those hours. It argues that if the 'zero hours' provisions, introduced to the Act as at 1 April 2016, applied then WIS

could only owe a maximum of unpaid wages to Mr XYZ for 16.42 hours. However, I have found that WIS was bound to supply 40 hours of paid work per week to Mr XYZ in the IEA from the beginning of the employment. I proceed on that basis.

[38] On the basis of evidence I had, except for annual leave being paid to Mr XYZ over the Christmas closedown of 2014-2015, I have not found much evidence of WIS deciding to pay annual leave to Mr XYZ instead of supplying work. I do not consider Mr XYZ was negatively impacted by WIS deciding to credit him with paid leave in advance over the 2014-2015 Christmas closedown; instead, he gained the benefit of being paid for some of that time when he was not yet eligible for paid annual leave. If I found evidence of WIS deciding to pay out unrequested annual leave instead of providing 40 hours work I have remedied it by ordering WIS to pay Mr XYZ for those hours.

[39] One of the main differences in the parties' approaches to unpaid wages is a significant disagreement about whether days that Mr XYZ did not work were ones that WIS should have paid as differing kinds of paid leave, such as bereavement or sick leave.

[40] There is also a significant disagreement between the parties about how many days WIS told Mr XYZ there was no work on a day, or no more work for the day, and what days instead Mr XYZ decided to go home early, after installation work finished, rather than do any other work at the hourly rate of $16 per hour.

[41] The other difference between the parties is what hourly rate Mr XYZ should have been paid for hours not credited.

[42] I have undertaken my own analysis of each week's pay and calculated whether WIS paid Mr XYZ for his contractual and statutory entitlements, using my assumption that all things being equal Mr XYZ should have been provided the opportunity to work for a minimum of 40 hours per week. My analysis has been thorough and in the circumstances, I am satisfied that I have applied a fair analysis.

[43] In the absence of any written record from WIS of the reason for unpaid hours, such as sick leave without pay or 'no show' or other like notations, I have generally awarded pay to make the hours worked up to 40 per week. If, as WIS says, Mr XYZ chose to leave work early on some days, WIS had a responsibility to keep accurate daily time records that would have demonstrated that. However, I have not agreed with all of the hours claimed by Mr XYZ's counsel.

[44] When I have had to add paid hours to a week in order to reach 40 hours, I have used the appropriate hourly rate for the time period, either $15 or $16 per hour (from 12 July 2015). That is because if no installation work was made available to Mr XYZ he could not have earned more than $15 or $16 per hour.

Unpaid wages

[45] I have not found any evidence that when Mr XYZ worked he was paid less than the minimum wage per hour of work. In one or two weeks Mr XYZ was paid less than the minimum wage when what he was paid was divided by 40 hours, but in those weeks he had worked for fewer than 40 hours, not necessarily through WIS's fault.

[46] However, WIS does owe Mr XYZ further wages for 203 hours. The total amount owed is $3,230.50 gross.

[47] In addition, WIS must pay Mr XYZ 8% holiday pay on $3,230.50, which is $258.44 gross.

Sick leave/domestic leave

[48] Mr XYZ was entitled to his first year's allocation of five paid days of sick leave from 6 June 2015. He had exhausted that first allocation of paid sick leave by 19 July 2015. From February to July 2015, WIS paid Mr XYZ for 5 days sick leave.

[49] WIS paid Mr XYZ for another 2 days of sick leave during his employment despite him having several other sick days off work. However, WIS should have paid Mr XYZ for the balance of the 5 days sick leave he was eligible for. Mr XYZ has not proved that he should have been awarded any other paid sick leave, for either his own illness or that of his family.

[50] WIS owes Mr XYZ for 3 days paid sick leave at 8 hours a day. I have calculated Mr XYZ's average daily and weekly pay in June, July and August 2016. WIS owes Mr XYZ $459.56 for three days sick leave.

Wages lost as a result of the unjustified dismissal

[51] In my earlier determination, I found that Mr XYZ had adequately mitigated his loss and was eligible for lost wages, which I would reduce by 20% because of his contribution to the situation leading to his dismissal.

[52] I have had some difficulty in assessing the appropriate ordinary time remuneration for Mr XYZ to calculate lost wages over the three months following his dismissal. However, I have found that if Mr XYZ had been paid his 3 days of sick leave and the additional hours he should have been paid in June, July and August of 2016,[4] his average weekly gross ordinary time remuneration would have been $765.93 gross per week. Three months of $765.93 per week is $9,957.12 gross.

[53] According to the Summary of Earnings from the IRD for the relevant period, Mr XYZ earned a total of $4,865.88 gross. $9,957.12 - $4,865.88 = $5,091.24. When I deduct 20% for contributory behaviour from $5,091.24 I reach a total of $4,072.99 gross that WIS should pay Mr XYZ by way of lost wages. It should also pay 8% holiday pay on that being $325.84 gross.

[4] Being the last full three months he worked.

Should WIS pay a penalty for failing to supply wages and time records immediately upon request?

[54] On 26 October 2016, Ms Tucker wrote a letter to WIS on Mr XYZ's behalf raising his personal grievance of unjustified dismissal and raising a claim of failure to pay reasonable compensation for cancelled shifts and use of annual leave instead. Ms Tucker also requested "full wage, time and holiday records in relation to the wage claim."

[55] The records that WIS held were not provided until shortly before the first investigation meeting date. That late provision was in breach of WIS's obligation under s 130(2) of the Act to provide a copy of the wages and time record immediately upon request by an employee.

[56] In considering whether to impose a penalty and the quantum of any penalty, I need to take into account s 133A of the Act, which lists a non-exhaustive number of factors to consider.

[57] The matters include a consideration of the object of the Act set out in s 3, including promoting the effective enforcement of employment standards and reducing the need for judicial intervention. It is possible that early provision of wage and time records could assist parties to reach agreement on any amount of wages owed and reduce the need for judicial intervention. Although, I accept in this case the provision of what records WIS kept was not able to assist the parties to reach agreement or to avoid the Authority's intervention.

[58] The breach was not intentional but rather inadvertent, with Mr Riches understanding that his client had already complied with the request when he became involved. I need to consider whether Mr XYZ has suffered any loss or damage from the failure to provide the records sooner. Earlier provision of the records, such as they are, would have allowed all matters to have been heard together in 2017 and not resulted in so much delay to finalising the amounts owed.

[59] All employees who work a mix of piece rate work and hourly paid work are somewhat vulnerable to being paid incorrectly if their employer does not keep records that are compliant with the strict provisions set out in s 130 of the Act. However, that is not the failure that is being considered for a penalty. Instead, I am considering the delay in providing such records as WIS kept.

[60] I am not aware that WIS or Canterbury Interiors Limited, as it was previously named, has ever been found to have engaged in any similar conduct by the Authority or the Court.

[61] The maximum penalty for any breach of the Act by a corporation is $20,000. In order to establish the correct amount for a penalty I need to consider aggravating and mitigating factors. The sole mitigating factor is that the records were provided, albeit late, once the proceedings were commenced. There are no particular aggravating features. The breach is not at the extreme end of the spectrum for these kind of breaches. I consider a reduction of 75% appropriate, which leaves me with a provisional starting point of $5,000.

[62] The next consideration is the financial means of WIS to pay a penalty. I have received no evidence of WIS's means and no submissions on this point. However, I have no reason to suspect it would not be able to pay a reasonable penalty.

[63] My final consideration is to apply a proportionality or totality test to ensure the amount of a penalty is just in all the circumstances and is proportional to the severity of the breach and the harm it occasioned, as well as in line with other penalties imposed for similar breaches.

[64] After consideration of all relevant factors, I find that a penalty of $1,000 is sufficient to signal disapproval of WIS's failure to supply the records in a timely way. Under s 136 of the Act, I order WIS to pay the whole of the penalty to Mr XYZ because of the delay caused, at least in part, by the late provision of records.

Costs

[65] Mr XYZ has been in receipt of legal aid so any question of costs is subject to the requirements of sections 45 and 46 of the Legal Services Act 2011. If a determination of the Authority is nevertheless required, an application for costs should be submitted within 28 days of the date of this determination, with submissions in reply within 14 days after that.

Christine Hickey
Member of the Employment Relations Authority