IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2013] NZEmpC 212
CRC 27/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NATHAN GAVIN GUNNING Plaintiff
AND	BANKRUPT VEHICLE SALES AND FINANCE LIMITED Defendant

Hearing: 18 November 2013

Appearances: Peter Moore, advocate for the plaintiff
No appearance for the defendant

Judgment: 25 November 2013

JUDGMENT OF JUDGE A A COUCH

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[1] Mr Gunning did work for Bankrupt Vehicle Sales and Finance Limited (the Company) during August and September 2012. On 3 September 2012, their relationship ended. The plaintiff alleged that he had been an employee and that he was unjustifiably dismissed. He also raised other claims relating to his remuneration.

[2] Those issues were investigated by the Employment Relations Authority which determined:[1]

(a) Mr Gunning was an employee of the Company rather than an independent contractor.

(b) The agreement between the parties was for casual employment rather than an on-going employment relationship.

[1] [2013] NZERA Christchurch 73.

(c) As a casual employee, Mr Gunning was not dismissed.

(d) The Company owed the plaintiff $100 for commission and $40 for holiday pay.

(e) Mr Gunning was not paid less than the amount required by the Minimum Wage Act 1983.

(f) A penalty of $500 should be imposed on the Company for breach of the employment agreement, that sum to be paid to Mr Gunning.

[3] Mr Gunning challenged only some aspects of this determination and did not seek a hearing de novo, that is a full hearing of the entire matter. The Court was therefore required to decide the nature and extent of the hearing.[2] At a directions conference conducted on 2 August 2013, I gave the following direction:

> Extent of the hearing: the following issues:
>
> i) Whether the employment relationship between the parties was on-going or for casual employment.
>
> ii) If there was an on-going employment relationship, whether the plaintiff was unjustifiably dismissed.
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> iii) If the plaintiff was unjustifiably dismissed, what remedies (if any) ought to be awarded.
>
> iv) Whether the defendant was paid in accordance with the Minimum Wage Act 1983.
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> Nature of the hearing: the issues will be at large with the onus on the plaintiff to establish his claims.

[4] The Company was represented by Graham Hill, a solicitor practising in Blenheim. On behalf of the Company, he filed a statement of defence and appeared at the directions conference. At that conference, he said that, for reasons of cost, the Company would not be represented at the substantive hearing but wished to make submissions by way of memorandum. That permission was given by consent and a memorandum was duly filed very shortly before the hearing.

[5] At the same time, an affidavit of the sole director of the Company, Susan Chapman, was also filed. At the hearing, Mr Moore did not object to this affidavit being read but submitted that it ought not to be given any significant weight because

[2] Employment Relations Act 2000, s 182(3).

Ms Chapman was not available for cross examination. I agree. To the extent that what was said in the affidavit was inconsistent with the evidence given by the witnesses present in Court, I have discounted it.

Role of the Court

[6] Mr Hill's memorandum focussed on the role of the Court in a non de novo hearing. His primary submission was that, because a hearing de novo had not been sought or directed, the Authority should be regarded as the "finder of fact". He submitted that, as a consequence, the Court should not depart from any findings of fact reached by the Authority unless there were "overwhelmingly cogent" reasons to do so. In support of these submissions, Mr Hill referred to a number of authorities but emphasised the recent decision of the United Kingdom Supreme Court in *McGraddie v McGraddie.*[3]

[7] The jurisprudence relied on by Mr Hill is conventional and well established. It has developed, however, in the courts of general jurisdiction in relation to appeals. An election under s 179 of the Employment Relations Act 2000 (the Act) to challenge a determination of the Authority is not an appeal. As the full Court explained in *Koia v Carlyon Holdings Ltd:*[4]

> (a) *The Court's role*
>
> [21] This is a challenge to a determination of the Authority and is therefore governed by ss 179 to 183 of the Employment Relations Act 2000. This procedure replaces the former appeal under the Employment Contracts Act 1991 but is not an appeal and is therefore not subject to the common law restrictions on appeals, varying according to the nature of the appeal. While a challenge to an earlier decision, the proceeding before the Court is a separate proceeding. In this Court, it is an original proceeding, not a derivative proceeding: see *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409.

[8] The extent to which the Court will have regard to the Authority's determination depends on the nature of the hearing. Where there is a hearing de novo, it is a full hearing of the entire matter. Such hearings proceed without any assumptions about the Authority's findings of fact or its exercise of discretion. Indeed, the Court need not have any regard to the determination challenged.

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[3] [2013] UKSC 58.
[4] [2001] 1 ERNZ 585.

[9] Where a hearing de novo is not sought by the plaintiff and not directed by the Court, the nature and extent of the hearing is decided by the Court pursuant to s 182(3) of the Act. In this case, the scope of the hearing was limited to four specific issues and, in relation to those issues, I directed that "the issues will be at large with the onus on the plaintiff to establish his claims." The effect of this direction was that, in relation to those issues, the Court would make its own decision on the evidence adduced before it.[5] On other issues, the conclusions reached by the Authority would stand.

[10] For these reasons, I do not accept Mr Hill's submission that the Court must have particular regard to the Authority's findings of fact relating to the issues before it in this case. Rather, those issues must be resolved on the basis of the evidence before the Court.

Background and sequence of events

[11] The Company is operated by Ms Chapman who is a substantial shareholder and the sole director of it. She lives in Paraparaumu but the Company does business in other parts of New Zealand, including Christchurch. The Company provides finance to people who have poor credit ratings and are unable to obtain finance elsewhere. It also sells motor vehicles, including ex rental vehicles.

[12] Mr Gunning has cerebral palsy and a degree of autism. He grew up in Ashburton but, at the age of 16, moved to Christchurch where he cared for his terminally ill father. As a result, his schooling was limited.

[13] During the several years after he left school, Mr Gunning had paid employment for significant periods but was also unemployed at times. He developed an interest in cars. In April 2010, he purchased a car with finance provided by the Company. In the course of that transaction, he had his first contact with Ms Chapman.

[5] Employment Relations Act 2000, s 183(1).

[14] In early 2011, Mr Gunning was in arrears with his payments to the Company. Ms Chapman telephoned him to warn that he risked repossession of the car. Shortly afterwards, she telephoned him again to offer him work following up delinquent accounts in Christchurch. He accepted and worked for the Company for about four months. Initially, his wages were credited to his loan account with the Company but, later on, he was paid part of his earnings directly.

[15] In the course of that work, Mr Gunning met Shane Bell. It appears he was involved in the motor vehicle industry and that some of his customers obtained finance from the Company. He knew Ms Chapman.

[16] A few months after Mr Gunning finished working for the Company in 2011, he received a telephone call from Mr Bell who was then doing the work for the Company that Mr Gunning had previously done. He asked Mr Gunning to help him with some of the work for the Company and said that Ms Chapman had suggested he do so. Mr Gunning agreed and did a few small tasks for Mr Bell.

[17] Some time in late 2010 or in 2011, Mr Gunning purchased a second car. This was also financed by the Company. In late 2011, he purchased a third car financed elsewhere. He decided to pay off the balance of his loan from the Company by surrendering the first two cars to it. He was confident that the combined value of them well exceeded the amount owing. The cars were surrendered to Mr Bell on behalf of the Company in December 2011. Mr Bell acknowledged that the loan was fully paid and said that the security held over them would be discharged.

[18] On 16 August 2012, Ms Chapman left a message for Mr Gunning asking him to call her. He did so on Saturday 18 August 2012. Ms Chapman said that the Company had opened a car sales yard in Christchurch managed by Mr Bell. She offered him a job working there on Saturdays. She also said that he may be offered other days of work. Ms Chapman said that he would be paid $50 per day plus $50 commission for each sale or referral. She said that this could increase to $100 in time. Mr Gunning accepted this offer. Ms Chapman told Mr Gunning to contact Mr Bell to arrange the details. In the course of this conversation, Ms Chapman referred to the fact that Mr Gunning had worked for the Company before.

[19] On Monday 20 August 2012, Mr Gunning telephoned Mr Bell who was expecting the call. Mr Gunning asked if the work would be on Saturdays only. Mr Bell replied that he would need Mr Gunning some other days as well. They arranged to meet at the car yard in Sawyers Arms Road the following morning.

[20] That meeting duly took place. Mr Bell explained the work Mr Gunning would be required to do and they both remained at the yard for about 4 hours. Just before they left, Mr Bell asked Mr Gunning to work the following day which he agreed to do.

[21] Over the next two weeks, Mr Gunning worked another 8 days at the yard. This included two Saturdays when Mr Bell was attending his own business and not at the yard. On other days, Mr Bell was also absent or not present for long. The hours Mr Gunning worked varied but, with one exception, were close to four hours. That exception was Sunday 2 September 2012 on which Mr Gunning worked six hours. Mr Bell specifically asked Mr Gunning to work each of the days other than the Saturdays.

[22] Mr Gunning was paid $50 for each day he worked and Mr Gunning assumed that income tax had been deducted prior to payment.

[23] Mr Gunning had been instrumental in the sale of several vehicles from the yard. On Saturday 1 September 2012, he telephoned Ms Chapman to ask why he had not been paid all of the commissions he believed were owing to him. Ms Chapman replied that he was only entitled to commission on sales made for cash not those financed through the Company. Mr Gunning did not accept that this was what they had agreed.

[24] On Monday 3 September 2012, Mr Gunning sought advice from the employment section of the Ministry of Business, Innovation and Employment. He was told that the Company should have provided him with an employment agreement before he started work and was advised to get one finalised as soon as possible. Mr Gunning acted on this advice by sending Ms Chapman a text message later that day, asking for an employment agreement "ASAP". This led to a telephone

call from Ms Chapman which became heated and in which she said to Mr Gunning "if you're gonna act like that, I'll call it quits. If you have that attitude, never expect to get a job someplace else." Ms Chapman then told Mr Gunning that his wages had been paid up to that day. Mr Gunning understood these statements by Ms Chapman to mean he had been dismissed.

[25] Shortly after that, Mr Bell telephoned Mr Gunning. The conversation became heated and Mr Bell threatened to "dob" Mr Gunning in to Work and Income New Zealand. Mr Gunning then telephoned Ms Chapman to complain about Mr Bell. This resulted in a further conversation with Mr Bell in which he threatened to have Mr Gunning's car repossessed.

[26] From that point on, all communications were by text message or email. Mr Gunning raised a personal grievance that he had been unjustifiably dismissed and made claims for arrears of wages.

[27] After those claims were made, Ms Chapman claimed that Mr Gunning still owed the Company money on the loan secured over the two vehicles surrendered in December 2011. This was referred by Mr Gunning to Financial Services Complaints Limited.[6] It emerged that the vehicles had been sold for sums which exceeded the amount owing to the Company and the complaint was resolved by the Company paying the excess to Mr Gunning.

Nature of the employment relationship

[28] The Authority determined that the parties had an employment relationship but that it was for casual employment only. As a result, the Authority concluded that Mr Gunning had not been dismissed and rejected his personal grievance. The first issue for decision by the Court is whether the employment relationship was on-going or for casual employment.

[6] An independent not-for-profit External Dispute Resolution scheme approved by the Minister for Consumer Affairs under the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

[29] In deciding this issue, I apply the principles enunciated in *Jinkinson v Oceana Gold (NZ) Ltd.*[7] One essential feature of an on-going employment relationship is that there be a "mutuality of obligation" by the employer to offer work and by the employee to accept the work offered. In this case, it is clear from the evidence adduced before the Court that Mr Gunning was engaged by the Company to work every Saturday. It is equally clear that this was given effect. Mr Gunning worked each Saturday and, given he was the only employee at the yard on those days, the Company relied on his doing that work.

[30] I am also satisfied that the other essential aspects of a contract of service were present. It was agreed that Mr Gunning would be paid for his work and the rate of payment was defined. The place of work and the nature of the work he was to perform were also agreed. The parties' history of a previous on-going employment relationship is also relevant.

[31] I find that the employment relationship between the parties in August and September 2012 was on-going.

Was Mr Gunning unjustifiably dismissed?

[32] The second issue raised in the challenge was whether Mr Gunning was unjustifiably dismissed. On the evidence before the Court, he undoubtedly was. Mr Gunning said that he understood from the first telephone conversation he had with Ms Chapman on 3 September 2012 that his employment was at an end. On the basis of his evidence about what was said and of the context in which that conversation took place, that was a reasonable conclusion for him to reach.

[33] The subsequent conversations Mr Gunning had with Mr Bell and Ms Chapman tended to confirm that impression. I mention the conversations with Mr Bell because it is clear that he was held out by Ms Chapman as the agent of the Company with respect to Mr Gunning's employment. In particular, Mr Bell told Mr Gunning what his duties were and decided what days of work he would be offered other than Saturdays.

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[7] [2009] ERNZ 225.

[34] No attempt was made on behalf of the Company to justify Mr Gunning's dismissal. On the evidence before the Court, it appears the dismissal was Ms Chapman's response to Mr Gunning attempting to assert his statutory right to have a written employment agreement. That was plainly unjustifiable.

Minimum Wage

[35] The evidence establishes that Mr Gunning worked for the Company on nine days. Tuesday 21 August 2012 was apparently not regarded by the Authority as a working day but I find that it was. The employment relationship had been formed the previous Saturday. Mr Gunning was present at the yard for some four hours at the employer's request. During that time, he received some training and observed the working of the business. He was entitled to be paid for that attendance.

[36] For Tuesday 21 August 2012, Mr Gunning was given $50 "petrol money". For each other day he worked, he was paid $50. The Authority also found he was entitled to $100 commission. No PAYE tax was paid by the Company in respect of these payments.

[37] The Minimum Wage Act 1983 provides that workers must be paid at not less than the rates of wages prescribed from time to time by Order in Council. The order applicable to the parties in this case was the Minimum Wage Order 2012. Clause 4 of that Order provided:

> **4 Minimum adult rates**
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> The following rates are the minimum rates of wages payable to an adult worker:
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> (a) for an adult worker paid by the hour or by piecework, $13.50 per hour:
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> (b) for an adult worker paid by the day,—
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> (i) $108 per day; and
>
> (ii) $13.50 per hour for each hour exceeding 8 hours worked by a worker on a day:
>
> (c) in all other cases,—
>
> (i) $540 per week; and
>
> (ii) $13.50 per hour for each hour exceeding 40 hours worked by a worker in a week.

[38] In its consideration of this issue, the Authority concluded that Mr Gunning had worked a total of 30 hours and that, at the minimum hourly rate of $13.50 then applicable, he should have been paid a total of $405. As Mr Gunning was paid, or entitled to be paid, a total of $500 including commissions, the Authority found the Company had discharged its obligations under the Minimum Wage Act.

[39] Citing *Idea Services Ltd v Dickson*,[8] Mr Moore submitted that the Authority was wrong to take this "averaging" approach. I accept that submission.

[40] Mr Moore then went on to submit that Mr Gunning was entitled to be paid not less than $13.50 for each and every hour that he worked. This submission implicitly relied on an assumption that Mr Gunning was employed by the hour. That assumption is problematic. The statutory obligation of an employer is to pay not less than the "rate of wages" prescribed by the Minimum Wage Order.[9] As the full Court in *Dickson* explained, those Orders prescribe three different rates depending on whether the worker is paid "by the hour or by piecework", "by the day" or otherwise.[10] Which rate applies to any particular worker requires a finding of fact about the terms of the employment agreement. In Mr Dickson's case, the full Court found that he was paid by the hour. This was because the terms of employment relating to payment were expressed in sums of money per hour.

[41] In this case, there is no evidence that it was agreed Mr Gunning would be paid by the hour. Rather, the evidence is that it was agreed he would be paid $50 per day and he was actually paid on that basis regardless of the hours actually worked. Of the three options under the Minimum Wage Order, this supports only the conclusion that he was paid by the day. This conclusion raises two issues.

[42] The first is that paras (b) and (c) of the Minimum Wage Orders are drafted on the assumption that workers will work an eight hour day or a 40 hour week.[11] It might be seen as anomalous that a worker who works less than eight hours a day but is employed by the day is entitled to a greater minimum wage than a worker

[8] [2011] ERNZ 192 (CA).
[9] Minimum Wage Act 1983, s 6.
[10] [2009] ERNZ 372 at [55].
[11] This was recognised by the Court of Appeal in *Dickson* at [31].

employed by the hour for the same time. The answer to this concern is that the employer who engages a worker on a daily rate is entitled to have that person work for eight hours and, if the employer releases the worker sooner, that is the employer's choice. To interpret the Minimum Wage Order provisions any other way would be to disturb the structure clearly evident in them and recognised by the Court of Appeal in *Dickson.*

[43] The second issue is how remuneration in the form of commission is to be taken into account. In the second full Court decision in *Dickson,*[12] the majority concluded that an allowance paid in respect of a number of hours should be credited by averaging it over the hours concerned. A similar approach was suggested in respect of piecework payments. Where a supplementary payment is earned by work done over a period of time which exceeds the basis for the rate of pay, that is appropriate. Where the payment is earned by a single action, the approach may be more direct. In this case, Mr Gunning was entitled to commission on two sales. They were made on different days. They may be taken into account under the Minimum Wage Act by giving the Company credit for paying him an additional $50 on each of those days.

[44] On this basis, I find that Mr Gunning was entitled under the Minimum Wage Act to payment of not less than $108 for each of the nine days he worked. That is a total of $972. The Company paid, or was ordered by the Authority to pay Mr Gunning $500. That means he is entitled to a further $472 by way of wages. He is also entitled to an additional 8 percent of that amount as holiday pay. That is a further $37.76. This makes the total arrears payable by the Company for the period of Mr Gunning's employment $509.76.

Personal grievance remedies

[45] In respect of his personal grievance, Mr Gunning sought reimbursement of lost income (including holiday pay and Kiwisaver contributions) and compensation for distress.

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[12] [2009] ERNZ 372 at [69] – [70].

Reimbursement of lost remuneration

[46] As to reimbursement, any entitlement under s 128 of the Act must be based on what the employee has lost "as a result of the personal grievance", in this case his unjustifiable dismissal. The primary entitlement under s 128(2) is to the lesser of the remuneration actually lost or to 3 months' ordinary time remuneration.

[47] Mr Gunning obtained alternative employment on 12 December 2012. He was therefore without work for 14 weeks. The evidence was that he did not try to obtain other work for about a month after his dismissal. This was explained as being due to the distress he experienced at being dismissed but I only accept that may explain his inaction for a short period. Another factor is that Mr Bell died in November 2012 and it appears the yard was closed either when that happened or shortly beforehand. I also have regard to the letter annexed to Ms Chapman's affidavit recording that the yard was only leased for a period of eight months in 2012. Overall, I conclude that Mr Gunning should be regarded as having lost earnings as a result of the grievance for 10 weeks.

[48] The next issue is how much work Mr Gunning would have been likely to perform each week had he not been dismissed. The original employment agreement he made with Ms Chapman was for only one day per week with the possibility of more. During the two weeks he actually worked at the yard, he completed four days per week but there is no evidence that he would have continued to be offered this amount of work and it would be wrong to make such an assumption. I proceed on the relatively conservative basis that Mr Gunning would probably have worked an average of two days per week had he not been dismissed. At the minimum wage rate of $108 per day for 10 weeks, that equates to lost earnings of $2,160.

[49] To properly apply s 128(2), I must also decide what Mr Gunning's "ordinary time remuneration" was. The very brief work history does not establish a sufficiently clear pattern to require a departure from the express terms of the employment agreement which were that Mr Gunning was engaged to work one day per week. Other days of work were at the employer's discretion and not part of his ordinary work. Thus, I find that his ordinary time remuneration was payment for one

day's work per week. It follows that three month's ordinary time remuneration was the applicable minimum daily wage for 13 weeks, which is $1,404. He is awarded that amount under s 128(2).

[50] There are no grounds to exercise the discretion conferred by s 128(3) to award Mr Gunning any further reimbursement of lost earnings.

Holiday pay

[51] In addition to reimbursement of the remuneration lost, Mr Gunning also seeks holiday pay in respect of that remuneration. Mr Moore made no submissions in support of this claim but, as it has been made, I must decide it. The claim raises an issue which does not appear to have been considered before by this Court. One approach would be to consider it under s 128 on the basis that holiday pay is a form of remuneration. There are difficulties with that approach, however, not the least of which is the limitation under s 128(2) to three months' ordinary time remuneration.

[52] The better approach is to consider it under s 123(1)(c)(ii) which allows an award of compensation for the "loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen". In *McKendry v Jansen*[13] the full Court concluded that compensation under s 123(1)(c)(ii) could be awarded for the loss of statutory entitlements under the Parental Leave and Employment Protection Act 1987. By analogy, I find that statutory benefits under the Holidays Act 2003 may also be the subject of compensation if it is established that they were lost as a result of the personal grievance.

[53] It is a fair assumption that Mr Gunning would not have actually taken any annual holidays during the period of 10 weeks following his dismissal as they would not have accrued. Accordingly, his entitlement to holiday pay would have been 8 percent of his gross earnings. That amounts to an additional $112.32.

[13] [2010] ERNZ 453.

Kiwisaver

[54] There was no evidence of any obligation on the Company to make Kiwisaver contributions. That aspect of the claim is dismissed.

Compensation for distress

[55] A good deal of evidence was given about the distress suffered by Mr Gunning following his dismissal. I refrain from setting that out in detail here but I note that this evidence can only be taken into account to the extent that it describes distress experienced by Mr Gunning personally and to the extent that this distress arose out of his dismissal and the events leading up to it. I do not have regard to distress experienced by his family or to distress arising out of other issues such as the threats made by Mr Bell or the Financial Services Complaints Ltd case, both of which occurred after the dismissal. Taking all the relevant evidence into account, I find that a just award of compensation is $4,000.

Contribution

[56] Mr Gunning did not contribute to the situation giving rise to his personal grievance. Section 124 of the Act therefore has no application.

Interest

[57] It is appropriate to award interest on the sums the Company is ordered to pay Mr Gunning by way of arrears of wages, reimbursement of lost remuneration and compensation for lost holiday pay. Interest is to be paid at the rate of 5 percent per annum on those sums until payment is made. Interest shall run on the arrears of wages from 3 September 2012 and on the reimbursement of lost remuneration and the holiday pay compensation from 22 October 2012.[14]

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[14] Being approximately half way through the period of 14 weeks in which Mr Gunning was unemployed.

Summary

[58] In summary, my decision is:

(a) Mr Gunning was employed by the Company on an on-going basis.

(b) Mr Gunning was unjustifiably dismissed by the Company

(c) The Company is ordered to pay Mr Gunning $509.76 as arrears of wages and holiday pay together with interest on that sum at 5 percent per annum from 3 September 2012.

(d) The Company is ordered to pay Mr Gunning $1,516.32 as reimbursement of lost remuneration and compensation for lost holiday pay together with interest on that sum at 5 percent per annum from 22 October 2012.

(e) The Company is ordered to pay Mr Gunning $4,000 as compensation for humiliation, loss of dignity and injury to his feelings.

Costs

[59] Costs are reserved. Unless costs can be agreed, Mr Moore should file and serve a memorandum within 20 working days after the date of this judgment. The Company will then have 15 working days to submit a memorandum in response.

A A Couch
Judge

Signed at 11.00am on 25 November 2013.