

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2020] NZEmpC 110  
EMPC 139/2018**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN GEORGE COWAN  
Plaintiff

AND CHARLES KIDD IN PARTNERSHIP  
WITH GEOFFREY KIDD, TRADING AS  
KIDD PARTNERSHIP  
Defendant

Hearing: 25-29 March and 25-27 November 2019  
(Heard at Invercargill)  
Further documents filed on 19 December 2019 and 3 February  
2020

Appearances: J R Copeland and K C Macdonald, counsel for plaintiff  
M-J Thomas and S N McKenzie, counsel for defendant

Judgment: 28 July 2020

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] The Employment Relations Authority (the Authority) found that Mr Cowan was employed by Kidd Partnership over the period 27 July 2010 to 23 May 2016.<sup>1</sup> It found that he had not worked on a full-time basis and assessed the hours he worked to be approximately half those claimed. The Authority found the appropriate rate that Mr Cowan ought to be paid was the then minimum wage at the time the work was performed. The Authority rejected Mr Cowan's personal grievance claim for

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<sup>1</sup> *Cowan v Kidd Partnership* [2018] NZERA Christchurch 50 (Member Crichton) at [125].

unjustifiable dismissal, but Kidd Partnership was ordered to pay a penalty of \$20,000 for breaches of the minimum code,<sup>2</sup> with all that sum to be paid to Mr Cowan.

[2] Mr Cowan has challenged the Authority's determination on a de novo basis. His complaints are that the Authority underestimated the hours that he worked for Kidd Partnership and that the appropriate rate of pay was what he says was the rate that would have been paid to an employee employed in the roles that he undertook, which was greater than the minimum wage. He continues to maintain he was unjustifiably dismissed by Kidd Partnership.

[3] In the Court, Kidd Partnership put Mr Cowan's employment status in issue.

[4] Regrettably the parties were unable to resolve matters between themselves.

[5] Accordingly, the principal issues this judgment needs to resolve are:

- (a) Was Mr Cowan an employee of Kidd Partnership?
- (b) If so, what hours did he work?
- (c) What is the appropriate rate of pay for those hours?
- (d) Was Mr Cowan unjustifiably dismissed, and if so, what remedies are due to him?
- (e) What penalties (if any) should be paid by Kidd Partnership?

[6] As set out in this judgment:

- (a) at times Mr Cowan was an employee of Kidd Partnership;
- (b) he was not engaged on a permanent full-time basis but rather on a casual basis and for fewer hours than he claims;
- (c) he is entitled to the minimum wage as it applied at the times he was employed;

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<sup>2</sup> Holidays Act 2003; Minimum Wage Act 1983; Employment Relations Act 2000. See Employment Relations Act 2000, s 5.

- (d) Mr Cowan was not unjustifiably dismissed;
- (e) penalties of \$20,000 are appropriate, half of which are to be paid to Mr Cowan.

### **Mr Cowan and Mr Kidd had been long-term friends**

[7] Extensive evidence has been given in this case. A summary of the essential facts follows.

[8] Kidd Partnership is a partnership between Mr Charles (Frank) Kidd (Mr Kidd) and his son Mr Geoffrey Kidd.<sup>3</sup> It operates businesses including farms in Southland and Otago and a retirement home in Winton, and owns property in and around Winton.

[9] Mr Kidd and Mr Cowan became friends almost 50 years ago. They had a shared interest in car racing and enjoyed each other's company. Over the period of their friendship, they had supported each other, as friends do.

[10] In 2009, Mr Cowan called Mr Kidd to tell him that his former matrimonial home in Invercargill had been sold, leaving him, at that point, without a home.

[11] Mr Kidd resides in Winton. He invited Mr Cowan to come and stay with him and his partner, Ms Ann Lauder. Mr Kidd and Ms Lauder's home has an upstairs apartment. At the relevant times, the apartment was not completely separated from the main house – there was a shared entrance – but it had its own kitchen, bathroom and living area. It is a two-bedroom apartment, but Mr Kidd stored some effects in the apartment, in particular in the second bedroom.

[12] Mr Cowan accepted the invitation and moved into the apartment in April 2009.

[13] Not long after he had arrived in Winton, there were discussions primarily between Mr Cowan and Mr Neville Kidd about a possible business enterprise. Mr Neville Kidd is also a son of Mr Kidd but not a partner in Kidd Partnership. The

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<sup>3</sup> The defendant in the filed proceedings simply referred to "Kidd Partnership". The intituling has been amended to more properly reflect the legal position.

discussion covered converting a movie theatre into a shopping centre and/or opening a plumbing business. The plumbing business progressed to a certain extent in premises owned by Kidd Partnership. In that context, Mr Cowan started setting up the shop, including supplying computer systems for the proposed business.

[14] In the event, the businesses discussed between Mr Cowan and Mr Neville Kidd did not progress very far.

[15] By August 2009 Mr Cowan was undertaking truck driving for Kidd Partnership. He also assisted with the construction of a rest home in Winton and with some other construction projects.

[16] In July 2010 Kidd Partnership transferred a section to Mr Cowan that it owned near the retirement home. It was one of two properties that were then available, and Mr Kidd invited Mr Cowan to pick the one that suited him best. Mr Cowan selected one, and it was ostensibly sold to him, although he did not pay any money for it. Mr Kidd says that, on legal advice, there was a sale and purchase agreement signed between Mr Kidd and Mr Cowan where the property was assigned a value of \$80,000. At that time the government valuation for the property was \$58,000.

[17] Part of the arrangement also was that Mr Cowan would purchase a pre-fabricated house and that Kidd Partnership would assist him in erecting that house on the section.

[18] Mr Cowan claims that the provision of the section and the assistance with the house was payment for work he had performed, and would continue to perform for Kidd Partnership. Mr Kidd's evidence on this point was somewhat conflicting. On the one hand he said that the transfer of the property and offer of assistance recognised that Mr Cowan had assisted the business, but he also said that it was provided to Mr Cowan essentially as a gift to help him out. I accept that there were mixed motives in the provision of the property and promised assistance with the house. Mr Kidd was concerned that his friend Mr Cowan was at or near retirement age without any home and in somewhat straitened circumstances. I also accept, however, that Mr Kidd recognised that Mr Cowan had been helping Kidd Partnership.

[19] The situation broke down. While it seems surprising, it appears that the catalyst for the breakdown was comments Mr Kidd made about the planned orientation of the proposed house. Mr Cowan did not proceed with the house, and Mr Kidd arranged for some of the equipment that had been left at the property to be moved to another site, something that Mr Cowan interpreted as being a decision on Kidd Partnership's part to no longer assist him with the house construction. Unfortunately, none of this seems to have been discussed in any meaningful way between Mr Cowan and Mr Kidd.

[20] In September 2011, Mr Cowan left Winton to go and stay with his daughter and son-in-law to assist them with a business they were operating. He was away for approximately five months.

[21] In March 2012, after he returned to Winton, Mr Cowan moved into a cottage that was near the retirement home that Kidd Partnership was developing in Winton. While he resided there Mr Cowan continued to assist with the construction of the retirement home, which was largely completed by April 2012. He also undertook some maintenance there both before and after completion.

[22] He continued to undertake truck driving between Winton and Invercargill and other areas in Southland and spent stretches of time at farming properties owned by Kidd Partnership.

[23] From 2009, Mr Cowan was receiving national superannuation. He was not paid by Kidd Partnership and also not charged any rent or board, either for the accommodation in Mr Kidd's own home or when he moved to the cottage at the retirement home.

[24] In undertaking activities for Kidd Partnership, Mr Cowan expected to be rewarded by Kidd Partnership, beyond the provision of the section and assistance with the house although the form of that reward was not crystallised, and no additional arrangements were made.

[25] Mr Cowan made a claim for wages in late 2015 or early 2016. By the end of May 2016, the situation had completely broken down. Mr Cowan raised a personal grievance and wage claim in July 2016. His claim before the Court covers the period between 27 July 2010 and 23 May 2016.

[26] Mr Cowan stayed in the rest home cottage until September 2016.

[27] Mr Cowan never had a written employment agreement and received no wages. It was understood by others, who were employed by Kidd Partnership, that Mr Cowan was not an employee but was undertaking tasks as a friend of Mr Kidd. There were no performance appraisals or real supervision of Mr Cowan, and the evidence was that, particularly when he was at the farms, he did not work consistently or at the level that the others there were working.

### **Question 1: What was the real nature of the relationship?**

[28] Determining whether Mr Cowan was an employee of Kidd Partnership involves an analysis of whether he comes within the definition of “employee” in s 6 of the Employment Relations Act 2000 (the Act). That section relevantly provides:

#### **6 Meaning of employee**

- (1) In this Act, unless the context otherwise requires, **employee**—
  - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
  - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[29] The arrangements between Kidd Partnership and Mr Cowan arose out of the friendship between Mr Kidd and Mr Cowan. Clearly it was not a usual situation where

an offer of employment was made and accepted between parties operating at arms' length.

[30] If a contractual analysis was applied to Mr Cowan's relationship with Kidd Partnership, he would fail. There was no certainty of terms and, based on the evidence, I am satisfied that neither party set out to have Mr Cowan as an employee of Kidd Partnership.

[31] However, s 6 looks beyond a strictly contractual analysis and requires the Court to consider the real nature of the relationship between the parties. Relationships can evolve over time and an employment relationship can be found even where there is no documentation evidencing it.<sup>4</sup>

[32] Mr Cowan arrived in Winton as a friend of Mr Kidd, and he moved into Mr Kidd's home on that basis. That he then had discussions with the Kidd family about possible projects, and some actions were taken to advance those projects, did not turn him into an employee of Kidd Partnership. Those exploratory and preliminary arrangements were in the nature of a joint venture and were mainly between Mr Cowan and Mr Neville Kidd. In any event, his claim does not extend to the period prior to 27 July 2010 and by that time he was performing tasks for Kidd Partnership.

[33] What happened here is that an employment relationship evolved alongside Mr Kidd and Mr Cowan's friendship. The tasks associated with the construction of the rest home, the truck driving, and the work on Kidd Partnership's farms were done for the benefit of Kidd Partnership and with the expectation of reward.

[34] The truck driving was that which would be expected of an employee. Mr Cowan did as directed and used Kidd Partnership's vehicles to do so. He kept a log book identifying the hours and other work on the days on which he was carrying out the truck driving. If he had not done the driving, Kidd Partnership would have paid someone else to do it. Mr Cowan was an employee of Kidd Partnership while undertaking that work.

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<sup>4</sup> *Prasad v LSG Sky Chefs NZ Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [18]-[19].

[35] The farm work also was that of an employee. The farms formed part of the business of Kidd Partnership and Mr Cowan undertook work alongside other employees and as directed.<sup>5</sup>

[36] There is agreement that Mr Cowan undertook construction work for Kidd Partnership – it is clear he worked on the rest home. Mr Galt, who gave evidence for Mr Cowan, and who worked on the rest home development, described Mr Cowan as a “dogsbody”, overseeing general works as well as doing labouring. Other witnesses, including Mr Kidd, described Mr Cowan as helping out or doing odd jobs. He was directed by Kidd Partnership personnel and working as part of its business on the construction work; when he carried out that work, he was an employee.

[37] Other activities were not required by Kidd Partnership or anybody else. Given the assistance that Mr Kidd had provided to Mr Cowan, and his life circumstances at the time, it is hardly surprising that Mr Cowan made himself useful. I find that Mr Cowan’s maintenance at the rest home was in this category and was not undertaken as an employee of Kidd Partnership.<sup>6</sup>

[38] There was no evidence that Mr Cowan had committed to working on a permanent basis or that any permanent arrangement had been offered. On some occasions, he would turn up when it suited him; on others he would be advised of driving work or called when people were away. Mr Cowan could have declined a particular “job” offered to him if that did not suit him and did so. He left to spend time with his daughter. There were other instances referred to in the evidence when Mr Cowan was not available for work, such as when Mr Cowan attended his granddaughter’s recital. He may have advised Mr Kidd when he was not going to be available, but he did not need his permission.

[39] Likewise, Kidd Partnership could simply stop offering engagements to Mr Cowan, which is what it did in May 2016.

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<sup>5</sup> *Kidd v Beaumont Family Trust* [2016] NZEmpC 158, [2016] ERNZ 257 at [45]-[56].

<sup>6</sup> The main areas of maintenance identified in the evidence was lawn and pool work and maintenance due to the rest home being unoccupied (such as airing out the rest home, flushing toilets and running taps).



## **Question 2: What hours did Mr Cowan work?**

[40] The Authority's approach to hours of work was to make an assessment that Mr Cowan worked approximately half the hours that he claimed. One of the reasons for Mr Cowan's challenge was that he did not accept that assessment.

[41] Mr Cowan put considerable effort into identifying what he says were the hours of his employment with Kidd Partnership. While I accept he did not deliberately inflate the hours, the records are unreliable and overstate his hours of work. This is understandable given he was attempting to recreate hours of irregular work dating back more than six years. There were many occasions, both before the Authority and in the Court, where Mr Cowan's assessment of his hours was shown to be incorrect. Although he took pains to amend his claim in the Court to remove those entries that had been challenged in the Authority, the challenges both there and in the Court gave rise to a more general conclusion that his assessment of the hours he worked cannot be wholly accepted.

[42] The most reliable evidence of his hours of work on the days he undertook driving is the logbooks, which were kept contemporaneously. To the extent they were tested in Court, they were, overall, accurate. The logbooks included other hours of work on the day in question, not just driving. I do not accept Mr Cowan's claim that the logbooks under-reported the daily hours of work. I also do not accept Mr Kidd's claims that the hours in the logbooks are, at times, inflated.

[43] There are obvious difficulties in determining now Mr Cowan's other hours of work. In reaching my assessment of both the farm and construction work undertaken by Mr Cowan, I have considered his evidence, that of the witnesses for Kidd Partnership, and the documentation where it exists. Mr Cowan was not managed in the same way as other employees, or required to work as hard as they did. On the farms this included Mr Cowan having more downtime than the others working there, reflecting the general understanding that he was there as a friend of Mr Kidd's, not as an employee. However, it is not possible to cut and dice an employee's day to carve out periods during which the employee is physically and mentally exerting themselves

and periods when they are waiting for work and not so engaged.<sup>7</sup> When Mr Cowan was at the farms he was present and available to undertake allocated tasks, and it was not practicable for him to leave.

[44] Nevertheless, I do not accept Mr Cowan undertook as much work as he now claims. I do not accept as proven that he was required by Kidd Partnership to attend to “general duties”, at least not to the extent claimed, which often was for full days or weeks, particularly in the 2012/2013 and 2013/2014 years. Having regard to the evidence in its entirety, I also consider that Mr Cowan’s work days were not always as long as he has claimed. My assessment of the work likely done each day by Mr Cowan reflects all these considerations.

[45] Mr Cowan also seeks additional payment when he worked on public holidays.<sup>8</sup> I accept Mr Cowan worked on 22 October 2012 (3 hours), 6 February 2013 (7 hours), 6 February 2015 (8 hours), 27 April 2015 (7 hours) and 29 March 2016 (8 hours). As he is entitled to be paid at a rate of time and a half for those days, the worked hours in the respective years should be increased by half the hours on those days. But as he was a casual employee he is not entitled to a day off in lieu.<sup>9</sup>

[46] The hours established by a review of the evidence, and including the extra hours to reflect public holiday work, are as follows:

<b>Income Year</b>	<b>Logbook</b>	<b>Other work</b>	<b>Allowance for Public holiday</b>	<b>Total</b>
From 27 July 2010 to 31 March 2011	117.5	794		911.5
From 1 April 2011 to 31 March 2012	100.75	855.5		956.25
From 1 April 2012 to 31 March 2013	410.25	875	5	1290.25
From 1 April 2013 to 31 March 2014	289.5	332		621.5
From 1 April 2014 to 31 March 2015	644.5	684.75	4	1333.25
From 1 April 2015 to 31 March 2016	730	1073.5	7.5	1811
From 1 April 2016 to 23 May 2016	73.75	0		73.75

<sup>7</sup> *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192 at [13].

<sup>8</sup> Holidays Act 2003, s 50.

<sup>9</sup> Holidays Act 2003, s 56.

### **Question 3: What is the appropriate rate of pay?**

[47] Mr Cowan argued he should be paid above the minimum wage because of the nature of the work he was undertaking and the skills and experience he brought to the jobs. He submits this arose out of an implied term that he would receive “reasonable remuneration” for the work performed.

[48] Traditionally a term can be implied in a contract if it is reasonable and equitable, needed to give business efficacy to the contract, represents the obvious but unexpressed intention of the parties, is capable of clear expression and does not contradict any express term of the contract.<sup>10</sup> In some approaches, this list is not seen as cumulative but with each element being a useful indicator relevant to the ultimate question of what a reasonable person would have understood the contract to mean.<sup>11</sup>

[49] As an alternative to a wage arrears claim under s 131, Mr Cowan argued that quantum meruit should apply, based on the principle of unjust enrichment. The applicable rate under this approach is also argued to exceed minimum wage. The Employment Court has the ability to consider quantum meruit claims provided that, as here, they arise from an employment relationship.<sup>12</sup>

[50] I do not accept that a term can be implied here that Mr Cowan would be remunerated at a rate higher than the minimum wage. Mr Cowan was working for Kidd Partnership because of his friendship with Mr Kidd. He was not required to work at the level expected of other employees and did not do so. He expected to receive something in return for the work he did, but the context points to a less than market rate: in colloquial terms, “mates’ rates”.

[51] In any event, the rates of pay of other employees of Kidd Partnership doing similar work to that done by Mr Cowan do not suggest a reasonable remuneration rate at the level argued for by Mr Cowan. Those other employees were not paid at rates

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<sup>10</sup> *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC).

<sup>11</sup> *Hickman v Turn and Wave Ltd* [2011] NZCA 100, [2011] 3 NZLR 318 at [248]. This decision was overturned on appeal but not on this point: *Hickman v Turn and Wave Ltd* [2012] NZSC 72, [2013] 1 NZLR 741.

<sup>12</sup> *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95, [2016] ERNZ 591 at [70].

much above the minimum wage. The employee whose work and experience most closely resembled that of Mr Cowan was one who had worked for Kidd Partnership for over 40 years doing truck driving and general farm work. He was on a full-time salary of \$38,000, which leads to an hourly rate of between \$16.24 and \$18.27, depending on what hours he worked in a particular week. A long-standing, full-time employee would be expected to be on a higher rate of pay than a casual employee engaged because of a friendship with a principal of the firm.

[52] Taking into account the context and the performance expected of and carried out by Mr Cowan, there is no basis for awarding Mr Cowan more than the minimum wage, either pursuant to an implied term or on a quantum meruit basis. Accordingly, he is entitled to be paid for the hours worked at the minimum wage rate as it then applied.

[53] Mr Cowan also is entitled to holiday pay calculated at the rate of 8 per cent of the wages due to him.

[54] Despite Mr Kidd's evidence that the transfer of the property represented a gift to Mr Cowan, Kidd Partnership submits any amount due to Mr Cowan ought to be reduced by \$80,000, being the stated value of the section transferred to him in July 2010. However, while I have accepted that the transfer in part recognised work done by Mr Cowan, its value cannot be taken into account in the calculation of wages due to him.<sup>13</sup> In any event, it is not possible to establish what portion of the value of the property might have reflected recognition for Mr Cowan's ongoing work for the period before the Court.

[55] I also consider the provision of accommodation was a personal arrangement entered into between Mr Kidd and Mr Cowan. That is particularly clear for the accommodation in the flat above Mr Kidd's home, but I view the move to the cottage as on the same basis.

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<sup>13</sup> Wages Protection Act 1983, s 7. If Kidd Partnership has a claim, it would be in another jurisdiction.

#### **Question 4: Was Mr Cowan unjustifiably dismissed?**

[56] Having found Mr Cowan was employed on a casual basis, it follows that Kidd Partnership's decision to cease offering him work was not a dismissal. Kidd Partnership was entitled to do that, and, in the circumstances, its decision to do so was unsurprising.

#### **Question 5: What penalties are appropriate?**

[57] Mr Cowan seeks an order that Kidd Partnership pay penalties of \$80,000 and an order pursuant to s 136(2) that penalties recovered be awarded to him in their entirety.

[58] The defendant is a partnership between Mr Kidd and Mr Geoffrey Kidd. The issue therefore arises whether the Court should impose penalties separately against each partner. Penalties against a partnership were explored recently by the Court in *Labour Inspector v Parihar*. Judge Perkins explained that a partnership is not a legal entity and that the partners therefore are two separate legal entities and liable to separate penalties.<sup>14</sup> As a result, each partner is liable to a penalty not exceeding \$10,000 for each breach.<sup>15</sup> However, care must be taken that the result of the Court's assessment does not incur double penalties.

[59] Section 133A of the Act sets out some matters to which the Authority or Court (as the case may be) must have regard to in determining an appropriate penalty. That is not a complete list. In *Nicholson v Ford*, Chief Judge Inglis drew the threads together from the Act and from the Court's previous decision in *Labour Inspector v Preet PVT Ltd*,<sup>16</sup> and provided a list of 12 matters that must be considered in assessing penalties:<sup>17</sup>

- (1) the object stated in s 3 of the Employment Relations Act;
- (2) the nature and extent of the breach or involvement in the breach;

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<sup>14</sup> *Labour Inspector v Parihar* [2019] NZEmpC 145 at [14].

<sup>15</sup> Employment Relations Act 2000, s 135(2)(a); Holidays Act 2003, s 75(1)(a).

<sup>16</sup> *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

<sup>17</sup> *Nicholson v Ford* [2018] NZEmpC 132, [2018] ERNZ 393 at [18].

- (3) whether the breach was intentional, inadvertent or negligent;
- (4) the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person in breach, or involved in the breach, because of the breach or involvement in the breach;
- (5) whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (6) the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee;
- (7) previous conduct;
- (8) deterrence, both particular and general;
- (9) culpability;
- (10) consistency of penalty awards in similar cases;
- (11) ability to pay; and
- (12) proportionality of outcome to breach(es).

[60] In this case there have been a number of breaches by Kidd Partnership of the Act, the Minimum Wage Act and the Holidays Act. It failed to pay Mr Cowan the wages due to him and also failed to provide a written employment agreement or to keep time and wage and holiday records. Those breaches arose out of Kidd Partnership's understanding that Mr Cowan was not an employee.

[61] Nevertheless, Kidd Partnership is an experienced employer conducting a number of businesses and ought to have turned its mind to regularising the position with Mr Cowan early on in the period of his employment. A penalty is appropriate but should reflect that the arrangement arose in the context of a personal relationship between Mr Kidd and Mr Cowan and that the breaches were not deliberate.

[62] Mr Cowan was not a vulnerable employee and shared responsibility for discussing and putting in place appropriate arrangements. There is no relevant previous conduct by the partners of Kidd Partnership.

[63] There is nothing to indicate that there would be any difficulty on the part of Kidd Partnership to make a payment of a reasonable penalty.

[64] In the circumstances, looking at the breaches in their totality, the penalty arrived at by the Authority of \$20,000 is appropriate. The arrangements were principally driven by Mr Kidd but, as a partner, Geoffrey Kidd ought to have made sure Kidd Partnership complied with the law. Accordingly, I order that a penalty of \$18,000 is payable by Mr Kidd and a penalty of \$2,000 is payable by Mr Geoffrey Kidd.

[65] The Court is authorised to order that a proportion of the penalties should be paid to the employee concerned.<sup>18</sup> In this case, some of the responsibility for the difficulties that arose were because of a lack of communication on Mr Cowan's part; it was incumbent on him in good faith to have raised the issues that were concerning him much earlier than he did. In the circumstances, I order that Mr Cowan is to receive \$10,000 of the penalty payable by Mr Kidd with the balance of both penalties being payable to the Crown.

### **Payments due to Mr Cowan from Kidd Partnership**

[66] In conclusion then, Mr Kidd and Mr Geoffrey Kidd trading as Kidd Partnership, must pay Mr Cowan:

<b>Income Year</b>	<b>Hours and Rate</b>	<b>Total</b>
From 27 July 2010 to 31 March 2011	911.5 hours at \$12.75 per hour	\$11,621.63
From 1 April 2011 to 31 March 2012	956.25 hours at \$13 per hour	\$12,431.25
From 1 April 2012 to 31 March 2013	1290.25 hours at \$13.50 per hour	\$17,418.38
From 1 April 2013 to 31 March 2014	621.5 hours at \$13.75 per hour	\$8,545.63
From 1 April 2014 to 31 March 2015	1333.25 hours at \$14.25 per hour	\$18,998.81

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<sup>18</sup> Employment Relations Act 2000, s 136(2).

From 1 April 2015 to 31 March 2016	1811 hours at \$14.75 per hour	\$ 26,712.25
From 1 April 2016 to 23 May 2016	73.75 hours at \$15.25 per hour	\$1,124.69
Sub-total		\$ 96,852.64
Holiday pay of 8 per cent of that sum		\$7,748.21
<b>Total</b>		<b>\$104,600.85</b>

[67] Mr Cowan is entitled to interest on these sums, calculated in accordance with the Judicature Act 1908.<sup>19</sup>

[68] Mr Kidd must pay a penalty of \$18,000; \$10,000 to Mr Cowan and \$8,000 to the Crown. Mr Geoffrey Kidd must pay a penalty of \$2,000 to the Crown. These penalties are to be paid within 14 days of the date of this judgment.

### **Costs are reserved**

[69] The parties should endeavour to agree on costs. However, if that is not possible and either party seeks an order for costs from the other party, they are to file a memorandum within 21 days of the date of this judgment. Any response is to be filed and served within a further 14 days with any reply to be filed within seven days thereafter.

J C Holden  
Judge

Judgment signed at 4 pm on 28 July 2020

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<sup>19</sup> The Interest on Money Claims Act 2016 does not apply as the claim was lodged prior to its commencement. See Interest on Money Claims Act 2016, s 5.