

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 131  
EMPC 315/2014**

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

AND IN THE MATTER    of holiday pay and costs

BETWEEN                ZING (WENDY) SU  
   Plaintiff

AND                        IGOLF LIMITED  
   First Defendant

AND                        XIAOMING ZHANG  
   Second Defendant

Hearing:                By memorandum filed on 29 May 2015

Appearances:        M Dillon, counsel for plaintiff  
   No appearances for either first or second defendant

Judgment:            31 July 2015

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**HOLIDAY PAY AND COSTS JUDGMENT OF JUDGE M E PERKINS**

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[1] In a judgment dated 15 May 2015,<sup>1</sup> Ms Su's challenge to a determination of the Employment Relations Authority (the Authority) was upheld.<sup>2</sup> The determination held that Ms Su was not an employee of either or both of the defendants. In allowing the challenge, the Court found that Ms Su was an employee of the first defendant. Certain remedies were granted including unpaid salary, interest and a penalty. The defendants did not take part in the challenge. They failed to file statements of defence and did not appear at the hearing.

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<sup>1</sup> *Su v iGolf Ltd* [2015] NZEmpC 66.

<sup>2</sup> *Su v iGolf Ltd* [2014] NZERA Auckland 450.

[2] In view of the award to Ms Su of unpaid salary, issues of holiday pay then arose. Costs were reserved. Ms Su was granted leave to file a memorandum through her legal counsel setting out the quantification of holiday pay to which she is entitled. The memorandum was also to contain Ms Su's submissions on costs.

[3] Counsel for Ms Su has now filed a comprehensive memorandum setting out the basis of calculation of holiday pay owing to her and including submissions on costs. The calculation of holiday pay has been made by applying the provisions of the Holidays Act 2003. Ms Su was not given annual holidays at all during the period of her employment with the first defendant. As she was employed for a period in excess of 12 months, upon the first anniversary of her commencement of employment she became entitled to four weeks annual leave on pay.<sup>3</sup> The sum payable to her for this untaken leave amounts to \$2,846.15. For the remaining period of employment amounting to 22 weeks, she was entitled to eight per cent of gross earnings for holiday pay.<sup>4</sup> This sum amounts to \$1,252.31. The total sum owing for holiday pay is therefore \$4,098.46. The first defendant is ordered to pay this sum to her. There is a further order for payment of interest, as provided in the Employment Relations Act 2000 (the Act).<sup>5</sup> It has accrued and will continue to accrue on the total sum from 30 September 2013 being the date of termination of employment until the date of payment.

[4] There is a claim for costs in respect of both the Authority proceedings and the challenge to the Court. By virtue of the judgment dealing with Ms Su's challenge, the determination of the Authority is set aside. No order for costs was made by the Authority. In view of the successful challenge Ms Su should receive an award of costs for the Authority's investigation. As the claim is less than the daily rate applied by the Authority, the full claim of \$2,173.50 is allowed. The first defendant is ordered to pay that sum to Ms Su.

[5] The principles applying to costs in the Court have been long established.<sup>6</sup>

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<sup>3</sup> Holidays Act 2003, s 16.

<sup>4</sup> Section 25.

<sup>5</sup> Schedule 3, cl 14(1), which refers to the rate prescribed under s 87(3) of the Judicature Act 1908 (presently 7.5 per cent per annum).

<sup>6</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[6] The Court has a wide discretion. Costs generally follow the event and are calculated on the basis of two thirds of reasonable actual costs.

[7] After allowing the costs for the Authority proceedings, the remaining legal costs incurred by Ms Su amount to \$9,806.20. In addition an interpreters fee for the hearing has been incurred amounting to \$575. Having perused the itemised attendances contained in bills of costs annexed to the memorandum of counsel, I am of the view that the fees charged were reasonable. While the challenge proceeded unopposed, the claims needed to be formally proved and preparation of a brief of evidence, a bundle of documents and submissions was necessary in the same manner as for a defended hearing. Two thirds of the costs charged amounts in round figures to \$6,537.

[8] Counsel for Ms Su submits that this is an appropriate case for indemnity or increased costs. That is based upon the behaviour of the defendants, particularly in the manner in which they participated at the last minute in the Authority proceedings, and their failure to engage at all with the challenge. However, those actions have already been addressed by the award of a penalty in this case. It is, therefore, not appropriate also to award indemnity or increased costs.

[9] There is no basis for a departure from the principles normally applying to orders for costs in this Court. Accordingly, there is an order that the first defendant contributes the sum of \$6,537 towards Ms Su's costs in respect of the challenge.

[10] In summary there is judgment for the plaintiff Ms Su against the first defendant for the following:

- a) holiday pay of \$4,098.46;
- b) interest on that sum from 30 September 2013 until payment at the rate provided in the Act;
- c) costs in respect of the Authority proceedings amounting to \$2,173.50;

- d) costs in respect of the challenge of \$6,537 together with a disbursement of \$575 for the interpreters fee.

M E Perkins  
Judge

Judgment signed at 2.45 pm on 31 July 2015