

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 134
5628381

BETWEEN SUSETTE BROWN
 Applicant

A N D YOUR SUCCESS LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Graeme Downing, Counsel for Applicant
 Kay Chapman, Advocate for Respondent

Investigation Meeting: 11 May 2017 at Nelson

Submissions Received: 25 May 2017 and 1 June 2017 for Applicant
 25 May 2017 and 2 June 2017 for Respondent

Date of Determination: 31 July 2017

DETERMINATION OF THE AUTHORITY

- A. I decline Susette Brown’s claims for personal grievances.**
- B. I decline Susette Brown’s claim for payment of holiday pay.**
- C. I decline Your Success Limited’s claim for overpayment of holiday pay.**
- D. Your Success Limited did not breach the duty of good faith and I will not impose a penalty.**
- E. Costs are reserved.**

Employment relationship problem

[1] The applicant, Susette Brown, claims that the respondent, Your Success Limited (Your Success), has underpaid the holiday pay owing to her at the

termination of her employment and failed to review her salary in line with its obligations under her employment agreement.

[2] Ms Brown says that these failures by Your Success means it acted unjustifiably to cause disadvantage to a term or condition of her employment and that these actions amount to a breach of the duty of good faith.

[3] Your Success says that Ms Brown has incorrectly calculated the amount of holiday pay owing at the termination of her employment because she has incorrectly applied a flexi time arrangement to days she took off rather than taking such days as holiday.

[4] Your Success says it did review Ms Brown's salary in line with its obligation under her employment agreement.

[5] Therefore, Your Success says it did not act unjustifiably as alleged and there is no breach of the duty of good faith.

[6] Your Success alleges that, in fact, it has overpaid Ms Brown her holiday pay and claims repayment of \$1,311.51 from Ms Brown.

Issues

[7] The issues that arise for the personal grievance of unjustified action causing disadvantage include:

- (a) Did Your Success act in a manner that caused disadvantage to Ms Brown's terms or conditions of employment?
- (b) If so, was that action justified, considering the statutory test for justification?

[8] Therefore, for the two grievances raised by Ms Brown I must establish if the action complained of occurred. If it did, I then need to decide if that action caused a disadvantage to Ms Brown's terms or conditions of her employment. Then if that has occurred, I must consider if the action was justified.

Holiday pay

[9] In order to resolve Ms Brown's personal grievance for disadvantage arising out of Your Success' alleged failure to pay the correct amount for accrued but untaken holiday at the termination of her employment I must first decide if the action occurred; did Your Success pay the incorrect amount for Ms Brown's accrued but untaken holiday entitlement?

[10] To do this I must determine Ms Brown's holiday entitlement and use this to calculate how much holiday Ms Brown accrued during her employment. I will calculate the holiday pay payable for the accrued holidays and I will deduct from that any holiday pay paid to Ms Brown for holidays taken by her.

[11] Ms Brown's employment was transferred from an accounting firm, Brown & Associates Accounting Group Limited (Browns) to Your Success in February 2015. Your Success was a merger between Browns and Robertson Chartered Accountants Limited (Robertsons).

[12] Ms Brown believed her employment was transferred to Your Success on the basis that her existing benefits and accrued holiday entitlement transferred to Your Success. This is particularly important because Browns had a flexi-time arrangement described as "unders and overs" that allowed employees to accumulate hours in excess of their contractual requirement and take that as holidays at a later date. Ms Brown says she expected this term to be replicated by Your Success and believed it had been.

[13] Your Success accepts that existing holiday entitlement transferred with employees but says that each transferring employee's terms and conditions were based on their existing entitlements but were not replicated. Some steps were required to harmonise terms and conditions between Browns employees and Robertsons employees and in some cases, increased benefits were negotiated. All terms and conditions of employment were recorded in new employment agreements introduced shortly after the merger.

[14] Ms Brown and Your Success had signed an employment agreement dated 4 May 2015 (the IEA). The IEA included the following term at clause 1(d):

d. It is a condition of this agreement that it will supersede all and any previous terms and conditions or understandings contained in any previous employment contract, agreement or understanding between the parties either written or verbal.

[15] The IEA included a provision at clause 6 of schedule 1:

The ordinary hours of work are 40 hours per week, Monday to Friday, at times agreed between us to meet the needs of the business, although ordinarily between 8:30 am and 5 pm. You may from time to time be required to work outside of these hours.

We operate a system of “give and take”, which is dependent on trust. There will be times particularly in our busy periods, where you will be working more than 40 hours per week. At other times you may wish to take time from work for a dentist appointment or a child’s sporting event for example. It is expected these types of events will form part of the “give and take”. We however reserve the right to formalise our approach by way of initiating a lieu time record, if we deem the “give and take” approach is not working.

[16] And at clause 10 of schedule 1:

You will be entitled to six weeks annual holidays upon completion of each year’s continuous service in accordance with the Holidays Act 2003, and will be paid in the pay that relates to the period of the annual holiday.

[17] Ms Brown had a holiday pay balance of \$53.85 that transferred with her employment to Your Success.¹ Ms Brown then worked from 3 February 2015 until 28 March 2016. Based upon her entitlement to six weeks annual holidays, Ms Brown’s accrued holiday entitlement amounted to holiday pay of \$9,847.53.² Ms Brown’s total accrued holiday pay was therefore \$9,901.38.

[18] The dispute between Ms Brown and Your Success arises over the days Ms Brown took as holiday and therefore the amount of holiday pay she was paid.

[19] Ms Brown applied the “unders and overs” system as it operated for her at Browns to her calculation of holidays taken. She did this on two bases; the applicable term of her employment was the “unders and overs” scheme that transferred with her employment or clause 6 of schedule 1 of the IEA is to be interpreted and applied in the same way as the “unders and overs” scheme.

¹ Both parties accepted this was the correct amount based upon the relevant documents.

² Both parties agreed that this was calculated as 12% of Ms Brown’s gross earnings during her employment with Your Success.

[20] Ms Brown kept a record of the number of hours she worked on a daily basis and then calculated, each week, whether her hours were under or over 40 hours being her ordinary hours of work under the IEA. Ms Brown then credited the overs amount to the complete days of leave she took and made up any shortfall with holiday pay.

[21] Your Success says Ms Brown was not employed on terms that included the “unders and overs” scheme; that term did not transfer with her employment and the applicable terms are clauses 6 and 10 of schedule 1 of the IEA.

[22] Your Success says the “give and take” system at clause 6 of schedule 1 was not meant to operate in the way Ms Brown applied it. It was not a flexi-time scheme or a day in lieu scheme, premised on employees storing up extra hours to use as leave. Rather it was a scheme that allowed employees to leave early or take an extended break during the working day to attend to personal matters; it applied to the odd hour taken here or there not days or, as Ms Brown used it, longer periods of leave. It follows therefore that the days that Ms Brown took as leave that she attributed to “give and take” hours, for which she treated the pay received, as normal salary was incorrect. These days were holidays and should have been paid out of her holiday pay entitlement calculated pursuant to clause 10 of schedule 1.

[23] I do not accept that the “unders and overs” scheme as it operated at Browns was a term of Ms Brown’s employment. This term did not transfer with her employment. There is no evidence that the transfer was agreed and it is inconsistent with clause 1(d) of the IEA, which provides that the IEA replaces any previous terms and conditions of employment.

[24] Therefore, the question I must answer is how are clauses 6 and 10 of schedule 1 of the IEA applied? In particular, is clause 6 of schedule 1 interpreted and applied so that days taken as leave are simply part of any “give and take” and Ms Brown is entitled to be paid her salary for these days in the normal way? Or, is clause 6 of schedule 1 to be interpreted and applied so that days taken as leave are not part of any “give and take” and therefore are treated as holidays paid pursuant to any entitlement under clause 10 of schedule 1?

[25] Before I turn to consider the principles of contractual interpretation and apply them to this question, one matter arises from the formulation of this question. It is clear that the resolution of Ms Brown’s grievance turns primarily on the interpretation

and application of provisions of the IEA. And therefore, under s 103(3) of the Employment Relations Act 2000 (the Act) the question of Ms Brown's entitlement to accrued but untaken holiday pay cannot give rise to a personal grievance.

[26] However, given ss 129 and 160(3) of the Act I will determine Ms Brown's claim as a claim for payment of holiday pay under the IEA and the Holidays Act 2003. The question to be resolved remains the same but if, as a result of answering that question, I determine there has been an underpayment of holiday pay I will not be required to consider whether there has been any disadvantage to Ms Brown and whether the action of Your Success was justified. It also follows that the only remedy can be payment of any unpaid holiday pay.

[27] The basic principles of contractual interpretation are well known and have been traversed by all courts from the Supreme Court through to the Employment Court. I have found two passages particularly instructive and helpful in outlining these principles.

[28] First, in *Vector Gas v Bay of Plenty energy*³ Justice Tipping stated at [19]:

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[29] Then, in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*⁴, Judge Ford summarised the principles from *Vector Gas* saying:

[17] In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept

³ [2010] NZSC 5

⁴ [2011] NZEmpC 149

that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to “cross-check” its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business common-sense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[30] Contractual interpretation requires me to establish, objectively, the meaning the parties intended their words to bear. It is not about what the parties say they intended the words to mean; I establish the objective meaning by assessing what a reasonable and properly informed third party would consider the words to mean. Being properly informed means the third party will have knowledge of the context in which the parties agreed the terms, so knowledge of the facts and circumstances that would be operating in the parties’ minds. Evidence of this contractual context is therefore relevant except if it does no more than establish what the parties subjectively intended their words to mean.

[31] I should take the natural and ordinary meaning of the words and accept this as being what the third party would take them to mean if they are not ambiguous in light of the contractual context and ensuring the interpretation accords with business common sense.

[32] If there is either an ambiguity based upon the words used or some illogical formulation evidenced by the crosscheck or application of business common sense then further analysis of extrinsic evidence will assist, such as the conduct of the parties after the contract was agreed. However, if the words are clear and have only one possible meaning then I should be very careful before I apply business common sense to achieve an interpretation that does not accord with those words⁵.

⁵ *Chief Executive of the Department of Corrections v Corrections Association of New Zealand Inc* [2005] ERNZ 984 (EmpC)

[33] When I assess what a properly informed third party would consider clause 6 of schedule 1 of the IEA to mean, I have in mind that the properly informed third party would be aware of the following facts and circumstances:

- a. Ms Brown was a senior employee with Your Success who had a large amount of discretion in how she carried out her role.
- b. Ms Brown was paid a good salary based on a working week of 40 hours, she was however expected to work additional hours outside of normal times if required.
- c. Your Success did not pay Ms Brown overtime or additional pay for extra hours worked.
- d. Ms Brown's holiday entitlement was six weeks, 50% more than the statutory minimum.
- e. Your Success wanted to be flexible in allowing employees to take time off during work for personal matters.
- f. Your Success did not have a formal time in lieu or flexi time scheme.

[34] A properly informed third party would not be aware of Ms Brown's opinion that clause 6 of schedule 1 operated the same way as the "unders and overs" scheme that was a term of her employment at Browns. This is because this evidence simply addresses Ms Brown's subjective view of what she intended the clause to mean.

[35] The ordinary meaning of the words in clause 6 of schedule 1, in the context outlined at [33], is that Ms Brown could take time off during work for personal matters such as attending a child's sports event or attending a medical appointment. This time would be limited to a few hours and was in recognition of extra work done but it was not to be a formal matching of hours worked over 40 per week for hours taken off work, which might occur with a formal lieu time scheme.

[36] The context in [33] supports this.

[37] And business common sense accords with this ordinary meaning. That senior employees, who are paid a salary, are expected to work additional hours without extra pay is not uncommon and the trade-off for additional work is often a higher salary and

enhanced benefits such as increased holiday entitlements. An exact matching of extra hours worked for time off is similar in principle to overtime and inconsistent with being paid a salary rather than a wage. In addition, some employers allow employees the flexibility to take long breaks or leave early for personal matters and this often operates on an informal basis but does not work as a scheme of accumulating hours to take as days of leave. This is even more so when an employee already has an enhanced leave entitlement.

[38] There is no ambiguity to the words of clause 6 of schedule 1 and the ordinary meaning accords with the context and business common sense. I do not need to consider this further by looking at how the parties acted or some other extrinsic evidence.

[39] I determine that Ms Brown applied clause 6 of schedule 1 incorrectly and she was not entitled to take complete days of leave as “give and take” and continue to be paid her salary in the normal way.

[40] As a result I believe any payment Ms Brown did receive for these days of leave was holiday pay or she was overpaid salary if she did not have enough holiday entitlement to cover the days taken.

[41] I need to determine how many days Ms Brown took as leave and therefore what she has effectively been paid as holiday pay either out of her holiday entitlement or in advance.

[42] There is no dispute between the parties that Ms Brown was paid holiday pay for 8 days in March 2015 and 2 days in April 2015.

[43] After April 2015, Ms Brown was away from the office for full days on 10 and 11 June, 1 September, 15 and 16 October, 13 November, 30 November, 1 – 7 December, 24 December, 30 and 31 December, 5 –12 January 2016, 15 January 2016 and 22 February 2016.

[44] Treating each day as an eight hour day and applying an hourly rate based upon Ms Brown’s salary the total amount paid to Ms Brown for the days in [42] and [43] is \$9,256.80.

[45] In addition to this amount, which I will treat as holiday pay, Your Success paid Ms Brown \$1,584.74 for holiday pay at the termination of her employment.

[46] In total Your Success has paid Ms Brown \$10,841.54 holiday pay. Ms Brown's holiday pay entitlement for the period of her employment was \$9,901.38 so she has received an additional \$940.16. There is no underpayment by Your Success as alleged.

[47] On the face of it, Ms Brown has in fact received an overpayment. However, I am not satisfied that given the circumstances of this case that it is appropriate that I order Ms Brown to repay this amount:

- a. Ms Brown did not act in bad faith and calculated her holiday entitlement based on her understanding of how clause 6 of schedule 1 should operate.
- b. If Ms Brown was aware that clause 6 of schedule 1 was to operate as I have determined then it is probable that she would not have taken additional days leave in excess of her holiday entitlement.
- c. It is also probable that had Ms Brown known she could not accumulate additional hours worked to take as leave under the "give and take" scheme she would have taken advantage of the opportunity to take a few hours off work (as "give and take" hours) to attend to personal matters.
- d. Your Success contributed to the misunderstanding by not properly monitoring and recording the holidays taken or the "give and take" scheme.
- e. Your Success incorrectly calculated the amount of holiday pay owing at the termination of Ms Brown's employment and must accept responsibility for that incorrect calculation.

[48] Neither Your Success' claim for repayment of the overpaid holiday pay nor Ms Brown's defence to that claim were pleaded formally on the basis of unjust enrichment and the alteration of position in reliance on receiving the alleged overpayment. However, it is the principles relating to this cause of action and

defence that inform my decision on repayment. Whilst I accept the payment of holiday pay was incorrect and a mistake made by Your Success, I am not satisfied that it is equitable in the circumstances to require Ms Brown to make payment to it, in fact, given the circumstances outlined above it would be inequitable.

[49] In these circumstances, I determine that Ms Brown is not required to repay any amount to Your Success.

Salary review

[50] Ms Brown's second personal grievance for unjustified action is premised on the allegation that Your Success failed to review her remuneration during the term of employment as it was obliged to do under clause 4(b) of the IEA. This clause provides:

Your remuneration will be reviewed annually no later than your anniversary date. The review will take into account the following but will not necessarily result in an increase:

National and local competitive pay rates for similar positions.
External economic factors, such as the rate of inflation.
Our financial and trading situation.
Your performance.
Changes in responsibility or employment conditions.

[51] Your Success says that it reviewed Ms Brown's remuneration in November 2015 and it has, therefore, complied with its obligations. Ms Brown says that there was no such review and therefore Your Success has failed to meet its obligation.

[52] I can deal with this grievance in simple terms. Having heard the evidence from Ms Brown and Your Success I am satisfied that Your Success did review Ms Brown's remuneration in November 2015. Your Success decided not to increase Ms Brown's salary or other benefits at that time. Your Success failed to tell Ms Brown of this review but this does not mean that it did not discharge its obligation under clause 4(b) of the IEA.

[53] The unjustified action Ms Brown complains of, that she says gives rise to disadvantage to a term or condition of her employment, did not happen and therefore there is no basis for her grievance.

Penalty for alleged breach of the duty of good faith

[54] Ms Brown's claim for a penalty to be imposed for a breach of good faith relies on the actions that support the two unjustified disadvantage grievances. I have determined that the actions complained of, the failure to pay the correct amount of accrued but untaken holiday pay and the failure to review salary, in accordance with the IEA, did not occur. So, it follows that there are no actions to support the allegation of breach of good faith and therefore I determine that Your Success did not breach the duty of good faith.

Determination

[55] I decline Susette Brown's claims for personal grievances.

[56] I decline Susette Brown's claim for payment of holiday pay.

[57] I decline Your Success Limited's claim for overpayment of holiday pay.

[58] Your Success Limited did not breach the duty of good faith and I will not impose a penalty.

Costs

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[60] If they are not able to do so and a determination on costs is needed any party seeking costs may lodge, and serve, a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge, and serve, any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen
Member of the Employment Relations Authority