

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 395
5381830

BETWEEN SCOTT PHILLIP CARROLL
Applicant

A N D VINCE ROBERTS
APPLIANCE WAREHOUSE
LTD
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
Mary Roberts on behalf of the Respondent

Investigation Meeting: 25 October 2012 at Auckland

Date of Determination: 13 November 2012

DETERMINATION OF THE AUTHORITY

Orders

- A. An order pursuant to s.114 of the Act determining there is no jurisdiction to consider Scott's personal grievances set out in paragraph [2] of the Determination.**
- B. An order pursuant to s.131 of the Act that the Company pay to Scott the total sum of \$18,116.35 being \$10,275.82 annual holiday pay and \$7,840.53 statutory holiday pay for the period 16 May 2006 to 28 November 2011.**
- C. An order pursuant to clause 11 Schedule 2 of the Act for interest on the judgment sum set out in paragraph B at the rate of 5% per annum calculated from 28 November 2011 until payment.**

D. An order pursuant to clause 15 Schedule 2 of the Act for the Company to pay \$71.56 to reimburse Scott's filing fee.

Employment relationship problem

[1] The applicant's, Scott Phillip Carroll ("Scott") employment was terminated by the respondent company, Vince Roberts Appliance Warehouse Ltd ("the Company") on or about 28 November 2011.

[2] Scott raised two personal grievances pursuant to s103 of the Employment Relations Act 2000 ("Act") via a Statement of Problem served on the respondent on 18 May 2012.

The personal grievances are:

- (a) his conditions of employment were affected to his disadvantage by the Company's action in reducing then cancelling a credit card in early-mid 2010 and reducing his work hours by one day on or about November 2010; and
- (b) he was unjustifiably dismissed by the Company terminating his employment effective immediately on 28 November 2011.

[3] Scott also seeks payment of wage arrears being annual holiday and statutory holiday pay for the period 2002 to 28 November 2011.

Issues

[4] The following issues arise:

- (a) whether the Authority has jurisdiction to consider the personal grievances raised in paragraph [2] above pursuant to s.114 of the Act?
- (b) what period and amount of holiday and statutory holiday pay is due and owing?

Facts

[5] Scott was employed by the Company in or about 2002. Work was allocated by roster. He generally worked 4 days per week up and until 2010 reducing to 3 days per week thereafter.

[6] In 2008 the Company provided Scott with a \$60 credit card to be used for his fuel costs in travelling to and from work.

[7] In early to mid 2010 the Company was experiencing financial difficulties and approached Scott to advise the credit card would be reduced from \$60 to \$20 per week. The credit card was initially reduced to \$20 per week then subsequently cancelled.

[8] There is a dispute about the explanation Scott was given for the reduction. Scott believes he was told all the staff would have the same reduction but subsequently discovered he was the only staff member to have a \$40 reduction then cancellation of the credit card. The Company alleges he was told he was to be brought into line with the other staff none of whom had a credit card.

[9] Scott expressed his dissatisfaction with the loss of the credit card to the Company in 2010. The Company apologised for its actions and any misunderstanding. Scott agreed at the investigation meeting that this resolved his personal grievance regarding the credit card. No further action was taken on the credit card until the service of the Statement of Problem on 18 May 2012.

[10] In late 2010 the Company advised all staff including Scott that they would be reducing staff hours by one day per week. Scott told the Company he would require an increased daily rate in order for him to sustain a liveable income. Scott was working 4 days per week and believed this would represent a 25% reduction in his income. The Company told him they would give his proposal consideration but subsequently reduced Scott's hours from 4 days to 3 days per week. No further action was taken by Scott on the reduction of work hours until the Statement of Problem was served on the respondent on 18 May 2012. Although Scott alleged another staff member subsequently received increased hours, he gave no details as to who that person was nor produced that person at the investigation meeting.

[11] On 28 November 2011 when Scott arrived for work, he was told by the Company this was to be his last day and his employment was to be terminated. The Company continued to pay Scott a total amount of \$11,070.00 over the following eleven weeks.

[12] The parties accepted Scott was entitled to 4 weeks notice following termination.

[13] In January 2012 Scott sought medical assistance for mental ill health and depression. A brief medical certificate dated 2 May 2012 was produced confirming on or about 9 January 2012 Scott presented with symptoms of anxiety and depression and had been receiving unspecified medical treatment. The medical certificate does not confirm any diagnosis of depression or other mental illness, give dates the applicant was unwell nor express an opinion on how this has affected Scott. The doctor was not made available for the investigation hearing nor provided any other evidence to the Authority.

[14] On or about 16 May 2012 Scott filed his Statement of Problem with the Authority raising personal grievances and seeking wage arrears.

[15] During the investigation meeting it was accepted by the Company Scott had not taken all of his annual holiday entitlements and had worked on some statutory holidays without adequate recompense or alternative holiday given.

Time Limitation for raising personal grievance

[16] Section 114(1) of the Act required Scott to raise a personal grievance with the Company within a period of 90 days from the date on which the action alleged to amount to personal grievance occurred or came to the notice of Scott which ever is the later.¹ The first time the personal grievances in paragraph [2] were raised with the Company was following the service of a statement of problem on 18 May 2012.

[17] The personal grievances in paragraph [2](a) arose at the latest in 2010. This is well outside the 90 day time limitation.

[18] The personal grievance in paragraph [2](b) arose on or about 28 November 2011. The grievance is at best 80 days outside the time limitation.

[19] The Company has not consented to the personal grievances being raised after the expiration of the 90 day period² and there is no application for leave to extend the period to raise a personal grievance.³

[20] Even if there was an application for leave before it, there is little or no evidence of exceptional circumstances justifying the grant of leave by the Authority.

¹ S114(1)

² See above

³ S114(3)

The medical evidence regarding Scott's mental illness and depression following termination is sparse and inconclusive and not of a calibre to meet the test of exceptional circumstance. It is also limited to the period following termination and therefore has no application to the personal grievances which arose in 2010 (refer paragraph [2](a)).

[21] In the circumstances the Authority determines there is no jurisdiction to consider the personal grievances in paragraph [2] above.

Wage arrears – Annual Holiday Pay

[22] Scott claims wage arrears in the form of annual holiday and statutory holiday pay for the period 2002 to 28 November 2011.

[23] The recovery of wage arrears is subject to a statutory time limitation period of six years.⁴ The relevant period for calculating annual holiday and statutory holiday pay will be six years prior to the filing of the statement of problem being 16 May 2012 to 28 November 2011 (“the relevant period”).

[24] Despite a direction to provide wage and time records, the Company was unable and/or unwilling to do so. By consent the Authority sought the assistance of Mediation Services to provide material which had been given to them by the Company. The Authority was provided with copies of the Company's work rosters and the IR3 forms and employer monthly schedules provided to Inland Revenue.

[25] Scott provided his Summary of Earnings for the tax years 1 April 2002 to 31 March 2012. The quantum of annual holiday pay due and owing has been calculated using Scott's Summary of Earnings for the relevant period divided by 52 to give the ordinary weekly pay multiplied by the number of annual holiday weeks.

[26] The parties assisted the Authority by reaching agreement on the dates leave was taken by Scott during the relevant period. The amount to be deducted for the leave is based upon the average daily rate set out in the Holidays Act 2003.⁵

⁴ S.142 of the Act.

⁵ s9A Holidays Act 2003.

[27] There was one deduction for leave taken by Scott from 23 March to 18 April 2006 which requires Authority determination as to the number of annual holiday days to be deducted for the 26 day period. Scott submitted he would have taken at most between 8 to 12 days annual holiday during this period as he was rostered to work 4 days per week and the period of leave was three and half weeks. The company made no submissions on this matter. Given the absence of wage and holiday records, the Authority accepts Scott's assessment of holidays taken and determines 10 leave days as a reasonable figure to be deducted.

[28] Scott accepted he had received \$11,070 in payments from the Company between 28 November 2011 and February 2012. The agreed four weeks notice shall be deducted from this amount and the balance applied to the wages owed.

[29] Accordingly the Authority determines the sum of \$10,275.82 annual holiday pay is due and owing by the Company to Scott as set out in table below:

| Holiday Pay Table | | |
|-------------------------------|--|----------------------------|
| Date | Average weekly earnings | Annual Holiday entitlement |
| 16/05/06 – 31/03/07 | $\$49,088/52^6 = \$944 @ 3 \text{ weeks}$ | \$2,832.00 |
| 01/04/07-31/03/08 | $\$49,088/52 = \$944 @ 4 \text{ weeks}$ | \$3,776.00 |
| 01/04/08-31/03/09 | $\$46,197^7/52 = \$888.40 @ 4 \text{ weeks}$ | \$3,553.60 |
| 01/04/09-31/03/10 | $\$53,130/52 = \$1,021.73 @ 4 \text{ weeks}$ | \$4,086.92 |
| 01/04/10-31/03/11 | $\$46,503/52 = \$894.29 @ 4 \text{ weeks}$ | \$3,577.16 |
| 01/04/11 – 28/11/11 | $\$35,424/34^8 = \$1,041.88 @ 4 \text{ weeks}$ | \$4,167.52 |
| Subtotal | | \$21,993.20 |
| Less Agreed Deductions | | |
| | Part payment \$11,070 less \$4,167.56 (4 weeks notice @ \$1,041.88) | \$6,902.48 |
| | Deduction holidays taken between 23/03/06 to 18/04/06 (10 days @ \$236 ⁹) | \$2,360.00 |
| | Deduction holidays taken between 29/12/08 to 31/12/08 (3 days @ \$222.10 ¹⁰) | \$666.30 |
| | Deduction holidays taken between 15/03/11 to 24/03/11 (3 days @ \$298.10 ¹¹) | \$894.30 |

⁶ s8 Holidays Act 2003 'ordinary weekly pay' being gross earnings divided by 52 weeks multiplied by number of weeks for annual holiday entitlement.

⁷ Summary of Earnings for 2008/09 showed \$49,886.11 including ACC payment of \$3,689.11. Section 14(b)(ii) Holidays Act 2003 definition of "gross earnings" for calculation of holiday pay excludes ACC payments. Therefore gross earnings for 2008/09 were \$46,197.

⁸ 'Ordinary weekly pay' calculated by gross earnings divided by 34 weeks (weeks worked between 01/04 – 28/11) multiplied by number of weeks for annual holiday entitlement.

⁹ s9A(2) Holidays Act 2003 average daily rate calculation $\$49,088/208$ (4 working days per week x 52 weeks) = \$236.00.

¹⁰ s9A(2) Holidays Act 2003 average daily rate calculation $\$46,197/208$ (4 working days per week x 52 weeks) = \$222.10.

| | | |
|------------------------------|---|---------------------|
| | Deduction Whangarei holiday 2011 (3 days @ \$298.10 ¹²) | \$894.30 |
| Total Agreed Deductions | | \$11,717.38 |
| TOTAL HOLIDAY PAY DUE | | \$ 10,275.82 |

Wage arrears – Statutory Holiday Pay

[30] By agreement the statutory holiday pay owed to Scott has been based on his work roster for the relevant period. If Scott was recorded as working on a statutory holiday within the work roster the Company accepted it had not provided him with time in lieu or payment at the applicable time and half rate. The agreed dates Scott worked on statutory holidays are set out in the table below.

[31] Accordingly the Authority determines the sum of \$7,840.53 statutory holiday pay is owed by the Company to Scott as set out below:

| Statutory Holidays ✓ = worked x = not worked | | | | | | |
|--|-------------------------------|-------------------------------|---|---|--|---|
| Holiday | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
| New Years | X | X | X | X | X | X |
| NY after | X | X | X | X | ✓ | X |
| Auck Ann | X | ✓ | ✓ | ✓ | ✓ | ✓ |
| Waitangi Day | X | X | X | X | X | X |
| Good Friday | X | X | X | X | X | X |
| Easter Mon | X | X | X | X | X | X |
| ANZAC Day | X | X | X | X | X | X |
| Queens Bday | X | ✓ | ✓ | ✓ | ✓ | ✓ |
| Labour Day | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Xmas Day | X | X | X | X | X | X |
| Boxing Day | ✓ | ✓ | X | ✓ | ✓ | X |
| Av Daily Pay & stat days worked | \$236.00 ¹³ 2 days | \$236.00 ¹⁴ 4 days | \$236.00 ¹⁵ 1 day \$222.10 ¹⁶ 2 days | \$222.10 ¹⁷ 1 day \$255.43 ¹⁸ 2 days | \$255.43 ¹⁹ 2 days \$298.10 ²⁰ 3 days | \$298.10 ²¹ 1 day \$337.49 ²² 2 days |
| Time & half rate x stat days worked | \$354 x 2 | \$354 x 4 | \$354 x 1 \$333.15 x 2 | \$333.15 x 1 \$383.15 x 2 | \$383.15 x 2 \$447.15 x 3 | \$447.15 x 1 \$520.94 x 2 |
| Subtotals | \$708.00 | \$1,416.00 | \$1,020.30 | \$1,099.45 | \$2,107.75 | \$1,489.03 |
| TOTAL | | | | \$7,840.53 | | |

¹¹ s9A(2) Holidays Act 2003 average daily rate calculation \$46,503/156 (3 working days per week x 52 weeks) = \$298.10.

¹² See above.

¹³ See above n9.

¹⁴ See above.

¹⁵ See above.

¹⁶ See above n10.

¹⁷ See above.

¹⁸ s9A Holidays Act 2003 average daily rate calculation \$53,130.00/208 (4 working days x 52 weeks) = \$255.43.

¹⁹ See above.

²⁰ See above n11.

²¹ See above.

²² s9A(2) Holidays Act 2003 average daily rate calculation. Due to this being an incomplete year (34 weeks) the gross earnings of \$35,424/102 (3 working days x 34 weeks) = \$347.29

[32] The Authority further determines the applicant is entitled to interest on the judgment sum of 5 % from the date of termination being 28 November 2011 until payment.

Costs

[33] Scott was self-represented but incurred the cost of the Authority filing fee of \$71.56.

[34] The Authority determines this disbursement is a reasonable cost for the applicant to recover and an order for costs shall issue accordingly.

Determination

[35] The following orders are made:

- A) An order pursuant to s.114 of the Act determining there is no jurisdiction to consider the personal grievances set out in paragraph [2] of the Determination.
- B) An order pursuant to s.131 of the Act that the Company pay to Scott the total sum of \$18,116.35 being \$10,275.82 annual holiday pay and \$7,840.53 statutory holiday pay for the period 16 May 2006 to 28 November 2011.
- C) An order pursuant to clause 11 Schedule 2 of the Act for interest on the judgment sum set out in paragraph B at the rate of 5% per annum calculated from 28 November 2011 until payment.
- D) An order pursuant to clause 15 Schedule 2 of the Act for the Company to pay \$71.56 to reimburse Scott's filing fee.

T G Tetitaha

Member of the Employment Relations Authority