

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 120
5356696

BETWEEN NICOLA DEVINE
Applicant

AND UGP LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Alex Chadwick, Counsel for Applicant
Barry Hillyer, Advocate for Respondent

Hearing: 20 February 2012

Determination: 11 April 2012

DETERMINATION OF THE AUTHORITY

[1] The applicant, Ms Nicola Devine, seeks a compliance order with a Record of Settlement dated 23 November 2010. The order sought is that the respondent, UGP Limited, pay to the applicant holiday pay in the amount of \$1,206.86. This amount is the difference between the \$3,969.23 the applicant says she is owed and the \$2,760.23 that has been paid. Payment of interest on the outstanding amount is sought.

[2] The applicant also seeks a penalty as a result of the respondent's obstructive behaviour and refusal to pay any holiday pay until the proceedings were commenced.

[3] The relevant terms of settlement were that:

- That on 16 May 2011 the employment relationship would be deemed to have come to an end;
- That from 23 November until 7 February 2011 the applicant would remain on her full ordinary pay of \$60,000 per annum but would not be required to attend work;

- That during the respondent's Christmas shut down from 23 December 2010 to 10 January 2011 the applicant would be required to take annual leave;
- That from 7 February 2011 until the termination date the applicant would take parental leave;
- On the termination date all outstanding statutory entitlements would be paid to the applicant.

[4] The applicant contacted the Labour Inspectorate and on 4 August 2011 Ms Chadwick received a letter stating that Mr Hillyer had contacted the Labour Inspector, had provided the leave records and believed that no holiday pay was owed. The Labour Inspector declined to proceed with the matter indicating it would need to go to the Authority for resolution.

[5] On 19 August Ms Chadwick wrote to the respondent seeking payment of the applicant's outstanding holiday pay by 23 August 2011. On 30 August Swarbrick Beck Mackinnon replied acknowledging that holiday pay was owed but disputing the amount of holiday pay claimed by the applicant.

[6] On 2 September Ms Chadwick wrote stating that if payment was not received by 5pm on 5 September proceedings would be issued.

[7] On 13 September 2011 a Statement of Problem was filed and on 14 September 2011 the applicant was provided with a cheque for \$1,980.25 representing \$2,760.37 less tax, which the respondent considered to be the correct amount of holiday pay owed. Ms Swarbrick stated in a letter dated 14 September to Ms Chadwick that Mr Hillyer had been unaware that any holiday pay was owed and that she had only been able to contact him that day.

[8] The reason for the difference in the parties' calculations is that the respondent has calculated the applicant's leave on the basis of her average weekly earnings and not her ordinary weekly pay.

[9] Also, the respondent has not allowed in its calculation for the accrued leave which the applicant says she is entitled to be paid for leave accrued between the

anniversary of her employment on 16 April 2011 and the termination of her employment on 16 May 2011 in accordance with ss 25 (2) and 26 Holidays Act 2003.

[10] Section 21 Holidays Act 2003 provides for the method of calculation of annual holidays after an entitlement has arisen. The leave is to be paid at the rate either of the employee's average weekly earnings or ordinary weekly pay,

[11] If employment ends and an entitlement to annual holidays has arisen s 24 (2) provides that an employee is entitled to be paid for the portion of annual holidays not taken at the greater of either the employee's ordinary weekly pay as at the date of the end of the employment or the employee's average weekly earnings during the 12 months immediately before the end of the last pay period of the employee's employment.

[12] The applicant's ordinary weekly pay is greater than her average weekly pay, being \$1,153.85. Her average earnings were \$843.20 calculated on earnings of \$43,846.15 for the period 16 May 2010 until 6 February 2011, a period of 38 weeks; and no earnings from 7 February 2011 until 16 May 2011, the end of the employment.

[13] The applicant was entitled to 15 days annual leave as at her termination date. This is not disputed. The applicant therefore says she was owed \$3,461.54.

[14] Section 42 Parental Leave and Protection in Employment Act 1987 ("PLEPA") **Employers obligations in respect of remuneration and holiday pay** provides:

(1) Subject to subsections (2) and (3), the employer of an employee who takes any form of parental leave in accordance with this Act shall not be obliged to pay that employee any remuneration for—

(a) any period of the employee's parental leave under this Act; or

(b) any period during which the employee is entitled under this Act, following any period of parental leave, to preference in obtaining employment with the employer.

(2) If an employee becomes entitled to an annual holiday on pay during—

(a) a period of parental leave under this Act; or

(b) a period of preference in obtaining employment; or

(c) the period of 12 months commencing with the date on which the employee returns to work after a period of parental leave under this Act or a period of preference in obtaining employment,—

the employee is, despite anything in section 21 of the Holidays Act 2003, entitled to holiday pay for that holiday only at the rate of the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday is taken or paid out.

[15] Subsection (2) (a) (c) was amended by s 18 Holidays Amendment Act 2010 to include the words “*is taken or paid out*” as from 1 April 2011.

[16] The applicant says that this provision does not apply because it does not expressly alter the provision in s 24 Holidays Act which deals with the payment of annual pay up to termination of employment. The applicant says that Parliament would also have made reference to s 24 Holidays Act 2003 in s 42 (2) PLEPA had it intended holiday pay to be calculated only by reference to average weekly earnings for employees who have taken maternity leave prior to the termination of their employment.

[17] Section 24 Holidays Act provides for the payment of holiday pay when an employee has an entitlement to annual holidays. The calculation of such a payment is to be based on the weekly pay as established in s 21. The employer is to pay the greater of the average or last weekly pay.

[18] When s 42 PLEPA refers to s 21 Holidays Act it does so in the context of holiday pay being either taken or paid out and the reference to s 21 is a reference to the calculation method. Therefore the basis for the calculation of annual holiday pay for Ms Devine is correctly at the rate of her average earnings.

[19] The amount paid to the applicant is correct insofar as the payments up to 16 April 2100 are concerned. What has not been taken into account is the accrued payment that should have been made for the period 16 April 2011 to 16 May 2011. That payment is \$202.37 gross.

[20] Ms Devine has sought interest on the annual leave payments. Clause 11 of Schedule 2 Employment Relations Act allows the awarding of interest at the rate prescribed under s 87 (3) Judicature Act 2008. The Judicature (Prescribed Rate of Interest) Order 2011 (NZ) sets the rate at 5%.

[21] The respondent is to pay interest on the sum of \$1,980.26 at the rate of 5% from 16 May 2011 to 14 September 2011.

[22] The respondent is to pay the sum of \$202.37 to the applicant and to pay interest on that sum at the rate of 5% from 16 May 2011 until such time as the payment is made.

[23] I decline to award a penalty as I accept that the respondent believed he had fulfilled his obligations to the applicant.

Costs

[24] If the parties are unable to resolve the issue of costs the respondent is to file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority