

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Grant Lloyd Dixon (Applicant)
AND Goldstein Rural Limited (Respondent)
REPRESENTATIVES Grant Lloyd Dixon In person
Bruce Rogers, Advocate for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 10 March 2005
DATE OF DETERMINATION 13 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Grant Dixon worked for Goldstein Rural Limited (GRL) from 29 January 2004 until 26 July 2004 (inclusive). At the termination of his employment, he received a payment for final wages and holiday pay following a discussion with his employer. GRL says that there was an agreement then about the number of days' holiday pay owing. However, in August 2004, Mr Dixon lodged a statement of problem claiming arrears of holiday pay. In response, GRL says that there was an agreement for Mr Dixon to take holiday pay in advance during the employment when his partner became ill and also refers to the agreement at the end of the employment.

[2] Despite a direction to mediation, the parties were unable to agree on the arrangements for a meeting, so I convened an investigation meeting. Bruce Rogers participated for GRL and Grant Dixon gave evidence in support of his claim.

[3] To determine this problem, I need to identify the relevant terms of employment, set out the law relating to annual holidays taken in advance, make a finding about whether there was an agreement for Mr Dixon to take annual holidays in advance and, if necessary, calculate any arrears owing.

Terms of employment

[4] There is a written employment agreement dated 1 April 2004 that is applicable. Mr Dixon was employed as a farmhand and paid a salary of \$40,000.00 per annum (\$1,538.46 per fortnight) plus a taxable allowance of \$77.00 per fortnight to make the annual salary \$42,000.00 per annum. The hours of work clause says that *The hours worked each week by the Employee shall be as directed by the Employer to best suit the management of the farm and may be on any, or all, days of the week. However, normally the hours worked shall be: Start time: 7 – 8 am Finish time: 5 – 5.30.*

The agreement also provides for seasonal variations for shearing and harvesting then says *Notwithstanding 6.1, the Employee shall be available to work reasonable additional hours, from time to time, as required by the Employer.*

[5] It is not referred to in the written employment agreement but Mr Rogers says that the expectation was that Mr Dixon would work 5½ days per week. GRL did not keep any specific record of when Mr Dixon was at work. As Mr Rogers said in evidence, it was expected there would be *swings and roundabouts* over what was intended at the outset as a long term employment relationship.

[6] Mr Dixon was paid fortnightly by direct credit (or similar transaction) to his bank account. The payment was made regardless of the days or hours actually worked by Mr Dixon.

Annual leave in advance – the legal position

[7] The Holidays Act 2003 came into force on 1 April 2004. It states that an employer may allow an employee to take an agreed portion of the employee's annual holiday in advance (section 20). It also sets out how to calculate the holiday pay owed to an employee whose employment ceases before they have worked for 12 months and become entitled to annual holidays (section 23). In that situation, the employer must pay the employee 6% of their gross earnings less any amount paid to the employee for annual holidays taken in advance. These provisions mirror those applicable under the previous Act. Section 6 declares that the entitlements under the Holidays Act 2003 are minima and any agreement that reduces the employee's entitlement is ineffective.

Agreed annual holidays in advance

[8] On 28 April 2004, Mr Dixon's partner (Karin) became unwell and he took her to hospital. Karin was transferred from Ashburton Hospital to Christchurch Hospital then back to Ashburton Hospital. She eventually returned home on 17 May 2004. Mr Dixon spent a considerable amount of time during this period with Karin or looking after their child.

[9] Mr Dixon kept a notebook with his days and hours of work recorded which I accept as an accurate record of his work during the period of Karin's illness. 13 of the days during the above period are marked as days off. He worked full or part days on the remainder. However, Mr Dixon was paid his usual salary throughout. It is common ground that Mr Dixon had not accrued any entitlement to sick leave. His evidence is that he did not expect to be paid for his time off work over this period. However, he did talk to Mr Rogers about needing time off. I accept Mr Roger's evidence that there was an agreement at that stage that the time off would be treated as annual leave in advance.

[10] Mr Rogers gave evidence about other days when Mr Dixon finished early, started late or did not work. He provided me with extracts from his diary to support this. Mr Dixon relied on his notebook to establish when he was at work. To the extent they disagreed, it is unnecessary to resolve any differences. It was never suggested that Mr Dixon sought or GRL allowed such time as annual holidays in advance. If GRL or Mr Rogers had a problem at the time with the extent to which Mr Dixon was meeting his contractual obligations to work that should have been raised with him then. The law does not permit GRL to rely on Mr Dixon's default during the employment, if there was any, in order to reduce his entitlement under the Holidays Act 2003.

[11] Mr Dixon left the employment after notice, his last day of work being 26 July 2004. Mr Dixon and Mr Rogers spoke the next day about squaring up the final pay. Mr Rogers says that they reached an agreement about the amount of advance annual leave but that the agreement was

not recorded in writing. Mr Rogers says that for the purposes of that agreement he accepted that a day when short hours had been worked should be treated as a full day's work. However, the effect of section 6 of the Holidays Act 2003 is that any agreement is of no effect to the extent that it reduces Mr Dixon's minimum entitlements calculated in accordance with section 23. It is therefore unnecessary to determine whether there was an agreement or what was agreed.

Calculation of arrears

[12] Having found that there was an agreement for annual holidays in advance only in respect of the period of Karin's illness, I need to identify the number of days covered by the agreement for holidays in advance.

[13] In the pay period ending 7 May 2004, Mr Dixon worked 3 days and two ½ days when he would normally have worked 10 days and two ½ days. I find that he took 7 days annual holidays in advance. In the pay period ending 21 May, Mr Dixon worked 8 days and one ½ day. That leaves 2 days and one ½ day as annual holidays in advance. However, Mr Dixon worked on Waitangi Day (6 February) and Queen's Birthday (7 June) and is entitled to a day in lieu in respect of each day. I will treat both lieu days as having been taken during the period of Karin's illness. The total annual holidays in advance during the relevant period is therefore 7½ days. The gross pay for 7½ days out of an 11 day working fortnight comes to \$1,101.40 so that is the sum of holiday pay in advance received by Mr Dixon.

[14] When the employment started, Mr Dixon was paid a full fortnightly pay for the period ending 13 February 2004. However, it appears that he worked on the last two days of the previous pay period and was not paid for that work. After the investigation meeting I raised this with GRL. Mr Rogers advised me that the pay period ended on a Thursday not a Friday and conceded that there was one day's pay owing from when Mr Dixon commenced work. Accordingly, I will treat the pay period as ending on a Thursday and order GRL to pay one day's wages to Mr Dixon. For his work in the last pay period to Thursday 29 July 2004, Mr Dixon was paid only ¼ of a fortnight's salary (\$403.87). However, the employment ended on 26 July leaving a remainder of 3 days in the pay period that Mr Dixon did not work. His fortnightly salary should have been reduced by only 3 out of 11 days. For convenience, I will now add on the day from the start of the employment. Accordingly, Mr Dixon's final pay should have been reduced by only 2 out of 11 work days. He should have been paid \$1,321.76 rather than \$403.87, leaving \$917.89 still payable as arrears of salary. I order GRL to pay that sum to Mr Dixon.

[15] Because he worked on Queen's Birthday, Mr Dixon is entitled under the Holidays Act 2003 and the employment agreement to half time extra for the hours actually worked. The employment agreement says *normally the hours worked shall be: Start time 7 – 8 am Finish time 5 – 5.30*. That is between 8½ and 10 hours after allowing for a 30 minute unpaid meal break, or an average of 9¼ hours, which I will use as a standard day for the purpose of calculating half time extra for the 7 hours worked by Mr Dixon on Queen's Birthday. He is entitled to half of 7 by \$146.85 divided by 9¼, a total of \$55.56. I order GRL to pay that sum to Mr Dixon.

[16] The gross salary paid by GRL during the employment was \$19,789.39. That added to the arrears calculated above totals \$20,762.84 so 6 % holiday pay is \$1,245.77. Mr Dixon received \$1,101.40 as holiday pay in advance. He is entitled to the difference, a sum of \$144.37. I order GRL to pay that sum to Mr Dixon.

Summary

[17] Goldstein Rural Limited is to pay Mr Dixon \$1,117.82 in arrears of salary and holiday pay.

[18] Goldstein Rural Limited is also to pay Mr Dixon interest on that sum at the rate of 9%, starting on 26 July 2004 until the arrears are paid in full.

[19] Neither party was legally represented but Mr Dixon incurred the lodgement fee of \$70.00 to commence the action. Goldstein Rural Limited is to pay costs of \$70.00 to Mr Dixon.

Philip Cheyne
Member of Employment Relations Authority