

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 122
3066154

BETWEEN

DAVID BLAKE DOWNIE
Applicant

A N D

WOODLEY CONTRACTING
LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Christopher Robertson, counsel for the Applicant
Jonathan Loh, counsel for the Respondent

Investigation Meeting: 11 March 2020

Submissions Received: 11 March 2020 from the Applicant
11 March 2020 from the Respondent

Date of Determination: 17 March 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Blake Downie says that when he left the employment of Woodleys Contracting Limited (WC) in January 2014 his accumulated holiday pay owed was not paid to him and it was transferred as a liability to another company (Blake Downie Contracting Limited (BDC)) that, at the relevant time, he was an equal 50% shareholder alongside a Woodley Family Trust.

[2] Mr Downie's application to the Authority was lodged on 8 August 2019 claiming that WC had failed to pay his accumulated holiday pay upon his departure from employment and had failed, upon request, to provide holiday and leave records.

[3] Mr Downie sought payment of his accumulated holiday pay in an amount of \$16,425.46 as a remedy.

The Authority Investigation

[4] WC filed a statement in reply and Alister Woodley, a Director of WC, participated in the investigation meeting having provided a brief of evidence. Generally WC contended that the holiday pay was not owed as it had been "transferred" as a liability to BDC.

[5] Pursuant to s 174E of the Employment Relations Act 2000 I make findings of fact and law and outline conclusions on disputed issues and make orders but I do not record all evidence and submissions received.

[6] The issues to be decided are:

- a) Is Mr Downie owed holiday pay and if so, how much?
- b) Did WC keep any record of holidays utilised/owed and disclose such when requested?
- c) Was the liability for holiday pay owed being transferred from WCL to BDL, a legitimate device to avoid the obligation to pay out accumulated holiday pay?
- d) Whether costs should be awarded to the successful party.

What caused the Employment Relationship Problem?

[7] Mr Downie recalls commencing employment with WC in 1997 as a bailer/driver and having an individual employment agreement (IEA). In 2007 he progressed in the company to being offered a position as a Contracting Operations Manager as recorded in an unsigned IEA that had 1 December 2007 as a commencement date. Initially his salary was \$70,000 per annum rising to \$90,000 at the end of the employment relationship. The validity of the IEA was not disputed by either party but Mr Downie could not recall why he had not signed it.

[8] No performance issues were alluded to and Alister Woodley, a Director, owner and effective CEO of WC, described their relationship as cordial and that they (Mr Woodley and his partner Alison Woodley a co-director of WC) considered Mr Downie a trusted friend and an able employee who worked long hours in a busy role and did not utilise his full leave entitlement.

[9] In 2008, Mr and Mrs Woodley resolved to establish Mr Downie in a separate business entity (BDC) that they retained a 50% shareholding in and, they gifted Mr Downie the remaining portion of shares. From this point in time whilst building the business with significant assistance from WC, Mr Downie (with Mr Woodley's consent) spent increasingly more time on BDC's affairs to establish and grow the business.

[10] Mr Woodley suggested it was understood that Mr Downie's salary was cross-subsidised by WC but no documentation was made available to the Authority to establish what the split was and whether Mr Downie's IEA with WC had been varied to reflect such an arrangement.

[11] Mr Downie did acknowledge that initially WC and BDC were administered as one (including payroll services) and that some invoicing from BDC reflected this. This appeared to be an informal arrangement that was not surprising giving the interlocking ownership structure and the significant experience Mr Woodley had as a company director.

[12] Mr Woodley acknowledged he was effectively a silent partner in BDC and he left operational matters up to Mr Downie but suggested that he contributed to the growth of BDC through his industry contacts and shared client base.

[13] In January 2014 Mr Downie resigned his employ with WC to concentrate fully on BDC work. This move appeared to be mutually agreed. The Woodleys maintained a 50% stake in BDC and an interest in seeing the company develop.

[14] Whilst no documentation or evidence was provided to support any agreement on this, or any evidence proffered that it was done on professional accountancy advice, the holiday pay owed to Mr Downie was simply transferred as a liability to BDC's accounts.

[15] Mr Downie gave evidence that he soon thereafter raised the issue of him not being paid his accumulated holiday pay, informally with Graeme Brown then operations manager at

WC - a fact on being questioned by the Authority, Mr Woodley confirmed, by recalling being apprised of this and that he had agreed for it to be sorted out by his payroll administrator (an admission contrary to Mr Woodley's brief of evidence that claimed no knowledge of it being at issue until he received a letter from Mr Downie's counsel in July 2018).

[16] Mr Downie in giving evidence was somewhat vague on the timing of following the matter up claiming he made informal attempts to resolve matters with Mr Woodley.

[17] The matter remained unresolved until 28 July 2016, when BDC's accountant, Tony McCleary, received a call followed by an email from WC's payroll administrator seeking help in calculating Mr Downie's accumulated holiday pay during a period she was preparing the annual accounts. The administrator's email described it as "...leave that Blake is owed by Woodley Contracting?" Whilst Mr Woodley claimed no knowledge of this email at the time and vigorously asserted that it was not authorised, its timing also coincided with the beginning of negotiations between the parties on a proposal that Mr Downie purchase the Woodley's shareholding in BDC. Although Mr Woodley conceded that the holiday pay dispute was not part of the negotiations or included as consideration in the subsequent sale and purchase of his family shareholding, it can be implied or reasonable to assume, that this was a loose end that needed tidying and the administrator had prior knowledge of the accumulated holiday pay being in dispute (although she did not give evidence).

[18] Mr McCleary, a chartered accountant, who had undertaken work for both entities, gave evidence that the WC administrator called him prior to the email for clarification as she did not know how to calculate the holiday pay owing as she thought Mr Downie was employed by both companies. The administrator's email of 28 July 2016 attached a summary of Mr Downie's accumulated leave up to January 2014 and she indicated in the email that "I have documented the history from Empower and IMS Payroll but there is very little documented in writing". The latter reference to documentation may have been an allusion to the issue of whether the calculation was to be based on five or four weeks annual leave. Mr Downie's IEA referred to four weeks annual leave but the company practice was to grant longer serving employees an extra week's leave above the statutory entitlement. Mr Woodley when questioned, confirmed that it was likely an additional week had been granted to Mr Downie given his length of employment (at the time he left WC this was approximately 17 years).

[19] Mr McCleary proceeded to prepare a calculation based upon the information provided. There then was a significant delay until Mr Downie's counsel wrote to WC on 29 May 2018 attaching the calculation and the basis of such to support a claim of \$16,425.96 owing. Mr McCleary when asked his professional opinion on the correct accounting of accumulated holiday pay suggested that it was WC's responsibility and should not have been transferred as a liability to BDC.

[20] Mr Downie was unable to adequately explain the reason for the delay in pursuing the matter between 2016-18 or why he did not at the time provide Mr Woodley with the calculation that Mr McCleary had prepared, other than he had been busy with work (including negotiating buying out the Woodley's shareholding).

[21] Mr Woodley acknowledged that he had viewed the 29 May 2018 letter that included a request for the holidays and leave records of Mr Downie pursuant to s82(1)(b) Holidays Act 2003 but he claimed that was the first time he had seen the holiday pay calculation. When pressed, Mr Woodley said he decided to ignore the 28 May letter and he did not seek legal advice. He described his anger at the claim as he felt Mr Downie should have approached him personally. I perceive that this anger was genuine as he had described Mr Downie as a friend and wanted to just discuss the matter with him. Mr Woodley recalls then trying to call Mr Downie and when pressed, Mr Downie indicated that he did not respond because he had left it in the hands of his lawyer.

[22] Matters were not assisted by the parties not attending mediation but the Authority was not minded to redirect this matter on the grounds that the issue in dispute appeared relatively simple and involved non-payment of a statutory entitlement.

[23] During the period March 2016 until February 2017, WC engaged in discussions to divest the Woodley family shareholding in BDC. Mr McCleary was heavily involved in these discussions as BDC's accountant. This led to an agreement for sale and purchase of the 50% Woodley family shareholding going to Mr Downie that was concluded on 17 February 2017. The purchase price was significant and it could be contended that the Woodley family benefited from the sale and obtained a good return on their investment and input in setting up BDC with Mr Downie.

[24] The interim response from WC's Chief Financial Officer, Jon Gurr, to the 29 May 2018 letter from Mr Downie's counsel was not prompt (26 July 2019) and contained what has turned out in evidence to be two misleading statements: i.e. 1) that the holiday pay issue had been sorted as part of the sale of shares *arrangement* and 2) that Mr Downie had not previously raised the holiday pay issue. The request for a holidays and leave record was not met at this time or subsequently.

[25] Mr Gurr in a further letter of 14 August 2018 reiterated the two points relied on in his earlier letter and ignored the statutory request for holidays and leave records. To his credit, Mr Woodley in his brief of evidence conceded that the matter was not part of the share-holding sale discussions and that was not a defence WC was relying upon. Mr Woodley claimed he was unable to locate Mr Downie's personal file but could not explain the further significance of this point as he had conceded that payroll records would record holidays taken and they did not have a manual system of recording such as Mr Downie was salaried whilst employed by WC.

[26] On being questioned, both counsel for WC and Mr Woodley claimed that the specific quantum of the sum sought by Mr Downie was disputed but could provide no basis for this contention or any alternative calculation. An adjournment was suggested by counsel but when it was pointed out by the Authority that ample time had been provided to identify concerns with Mr McCleary's calculation (based upon information provided by WC) and that no issues had been identified in the statement in reply and no documentation had been attached to Mr Woodley's brief of evidence, this request was withdrawn by counsel. This left the only identified defence to the claim, gleaned from the statement in reply, as being that WC was not responsible for the accumulated holiday pay owed as it had been "transferred to the applicant's company ... at the end of his employment".

[27] Crucially, Mr Woodley conceded that he knew the accumulated holiday pay was owed but he was not sure how it should be calculated and he took no steps to suggest an alternative methodology to Mr Downie during the period of the dispute. In response to an initial question from the Authority on why he simply did not arrange payment in February 2014 when Mr Downie relinquished his employment with WC, Mr Woodley said he thought it had been sorted and he had directed Mr Downie to approach the payroll administrator (the author of the later 28 July 2016 email to Mr McCleary).

[28] At best, it was apparent that Mr Woodley believed he was entitled to transfer the accumulated holiday pay from WC to BDC on the basis that whilst being employed by WC, Mr Downie undertook work for BDC and the amount of time he spent on the latter entity increased. However, none of this was agreed or documented and Mr Woodley conceded that he knew the accumulated holiday pay owed was due to be paid. I also observe that in WC's statement in reply, it was conceded that during the period in dispute (2008-2014) WC paid Mr Downie for holidays taken without any evidence being proffered of this being apportioned to BDC.

Is Mr Downie owed holiday pay and how much?

[29] Given that the first premise was not contested and such is an entitlement under s24 Holidays Act 2003 where holidays are unused, the only issue to decide is how much is owed. I am persuaded in the absence of any documentation to the contrary, that the calculation Mr McCleary undertook is accurate as it was based upon information provided by the WC payroll administrator. Further, the email of 28 July 2016 indicates that the information's source was a digital payroll system. WC is a medium size employer (around 60 employees) that had a system for recording leave taken and thus balances owed. I also consider that although not documented, the calculation being based upon a 10% divisor is correct as Mr Woodley conceded that Mr Downie would have completed enough service to qualify for five weeks' holidays per annum from the relevant date in dispute.

[30] Counsel for WC suggested the claim was out of time noting it was first raised in 2018 and thus outside the six year limitation period contained in s142 Employment Relations Act 2000. I am not persuaded by this as the evidence given by Mr Woodley was that he became aware of the issue when Mr Downie raised it with him shortly after he ceased being employed by WC and the 29 May 2018 letter from Mr Downie's counsel is within six years of the date the accumulated holiday pay fell due in January 2014.

[31] I find Mr Downie is owed \$16,425.96 arrears of holiday pay.

Did WC keep any record of holidays utilised/owed and disclose such when requested?

[32] Section 81(2) of the Holidays Act 2003 provides an employer must at all times keep a holiday and leave record and at subsections (a) – (q) it details the information that should be

kept to comply with such including an individual employee's starting date and entitlements including leave not taken.

[33] Here I find that whilst WC appeared to have kept records, I am unable to conclude if all of the Act's prescriptive provisions have been met as such were not disclosed. However, in the context of this dispute I consider the email from the payroll administrator of 28 July 2016 demonstrated that compliance with the requirement that annual leave outstanding be recorded.

[34] On the second point in question, I find WC wilfully and deliberately breached an obligation to disclose the holidays and leave record upon a request made pursuant to s 82 (2) Holidays Act 2003. I ascertained no reason for non-compliance. Mr Woodley stated that he just ignored the issue until being directed to mediation by the Authority – this breach was compounded by WC not subsequently providing Mr Downie or the Authority with the full holidays and leave record.

[35] Counsel for WC referred to *Hatcher*¹ as an approach to be taken where no leave records exist and to presumably deflect the Authority from applying s83(3)-(4) Holidays Act 2003 that allows it to accept, in the absence of evidence to the contrary, statements made by an employee about the status of leave taken and actually paid for. Given that I have found that WC kept electronic records and that they were de-facto disclosed by the pay roll administrator (albeit in summary form), WC is not assisted by comment in *Hatcher* absolving an employer from keeping and disclosing records beyond six years from when the information is entered (s81(4)).

[36] I inevitably find from the above, that WC breached its obligation to keep and disclose on request Mr Downie's holidays and leave record but as no penalty was sought by Mr Downie I cannot consider this option. In any case as correctly identified by counsel for WC, it was arguably out of time and not permitted by s135 (5) Employment Relations Act 2000.

¹ *Shane Hatcher v Burgess Crowley Civil Limited* [2019] NZEmpC 117.

Was the liability for holiday pay owed being transferred from WCL to BDL, a legitimate device to avoid the obligation to pay out accumulated holiday pay?

[37] Whilst the above premise was the central plank of WC's defence no legal precedent or principle or existence of any formal agreement between the parties was advanced to support this contention. The simple fact is, Mr Downie up to January 2014, had accrued holiday pay under his IEA with WC because he had not taken his contractual leave entitlements both express and implied. Had the parties wished to vary this arrangement that Mr Downie was continuing to accrue holidays pursuant to his IEA with WC when he was also deployed on work with BDC, then such should have been recorded in writing and signed by both parties after the employee was given the opportunity to seek advice on the impact of such. I find no basis for the assertion that simply transferring the accumulated holiday pay as an accounting exercise onto the books of BDC as a liability, absolved WC's legal obligation to pay out the monetary value of accumulated leave not taken.

Summary

[38] Overall I have found that Woodleys Contracting Limited must pay David Blake Downie the sum of \$16,425.96 (gross) to cover statutory holiday pay owed.

Costs

[39] In the circumstances costs are reserved and I invite the parties to try and resolve the matter by agreement. Should this not be possible, I direct that a submission seeking legal costs be made by the applicant on or before 20 March 2020 and the respondent has until Friday 3 April 2020 to respond and likewise file a submission. I will then issue a costs determination.

David Beck
Member of the Employment Relations Authority