

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 216
5629523

BETWEEN PAUL EDLEY
Applicant

A N D LENCO SPORT NZ LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: A Cook, Counsel for Applicant
G West, Respondent Director
Investigation Meeting: On the papers
Submissions Received: 23 June 2017 from both parties
Date of Determination: 21 July 2017

DETERMINATION OF THE AUTHORITY

A. The investigation into the application for wage arrears for unpaid annual leave of \$17,677.18 and penalties arising therefrom is reopened.

B. Costs are reserved.

Employment relationship problem

[1] This is an application of the Authority's own motion to consider reopening an investigation. I may reopen an investigation upon such terms as are reasonable¹. The overriding consideration is the interests of justice. I must have regard to the likelihood of a miscarriage of justice and balance this against other relevant factors such as the importance of finality in litigation.²

Relevant Facts

[2] Paul Edley was employed by Lenco Sport NZ Limited (Lenco) in May 2006. At the time of his redundancy he was as a Production Manager.

¹ Schedule 2, Second Schedule, Employment Relations Act 2000 (the Act)

² *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [99]

[3] Mr Edley reported to his wife, Julie Edley. Until she resigned in April 2015 Julie Edley was also a director of Lenco.

[4] On 8 April 2016 Mr Edley was made redundant. He alleges this was an unjustified dismissal. That matter shall be the subject of a separate determination. It is not the subject of the reopening application.

[5] There is a separate application for payment of wage arrears of unpaid annual leave of \$17,677.18 due and owing to Mr Edley at termination. He also seeks a penalty for non-compliance with the Holidays Act 2003. These applications are the subject of the application for reopening.

Miscarriage of justice?

[6] A miscarriage of justice may occur if had the Authority been seized of the material, it would likely have reached a different conclusion.³

[7] At the hearing Mr Edley stated he had no agreement with Lenco for him to take days in lieu. Therefore all of his holidays noted upon his payslip were due and owing. Further he gave specific evidence about when he took holidays from 2006 to 2014. At no stage did Mr Edley advise he had been paid out any holidays.

[8] The respondent has now filed material after the hearing had concluded but prior to the issue of my decision. The material consists of leave application forms signed by Mr Edley for the period December 2006 to June 2014 and various typed schedules showing the alleged amounts of holidays taken.

[9] The respondent has also printed but not provided copies of Mr Edley's payslips that allegedly show holidays were taken and paid out to Mr Edley.

[10] I directed the parties to file any submissions about a reopening by 23 June 2017 at 3pm⁴. The applicant was also directed to advise if the leave forms reflected the leave requested by Mr Edley by 19 June 2017 at 3pm. The applicant advised that:

The Authority has asked one question of the applicant which is, whether the leave forms are accepted as reflecting the leave requested by Mr Edley.

³ *Young v Board Of Trustees Of Aorere College* [2013] NZEmpC 111 at [18].

⁴ Minute of the Authority dated 14 June 2017.

Mr Edley[’s] reply is that those requests were made by him, but whether he was granted leave on the basis of each request is not accepted.

[11] The above material raises issues about the evidence Mr Edley gave at hearing about his holidays. He has now confirmed he requested an estimated 66 days in lieu despite stating at hearing there was no agreement for him to have days in lieu. There is now evidence via his payslips that he took or was paid out 120 annual leave days. There is potential evidence he has in fact taken 186 annual leave days in total.

[12] At the time of his termination he was only entitled to 180 annual leave days and 8 % of his gross wage earned between 8 May 2015 and 8 April 2016. In his evidence Mr Edley alleged he was owed 53.79 annual leave days.

[13] It is clear the wage arrears part of the investigation needs to be reopened to prevent a possible miscarriage of justice. If this information had been before the Authority during hearing, a different conclusion about the weight of Mr Edley’s evidence would have been reached.

[14] This is because s132 of the Employment Relations Act 2000 states that where there has been a failure to keep or produce wage records I may accept as proved all claims made by an employee “*unless the defendant proves those claims are incorrect*”. There is no doubt Lenco does not have accurate leave records. However the evidence before me may disprove some or all of the claims by Mr Edley.

[15] Accordingly, the investigation into the application for wage arrears for unpaid annual leave of \$17,677.18 and penalties arising therefrom is reopened. Costs are reserved. The parties are to liaise with the Registry regarding their availability for a further one day hearing in September, October or November 2017.

T G Tetitaha
Member of the Employment Relations Authority