

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA AUCKLAND 378
5327939

BETWEEN	PAUL GUMBLEY Applicant
AND	JUDITH SELFE Respondent

Member of Authority:	R A Monaghan
Representatives:	P Gumbley, in person J Selfe, in person
Investigation meeting:	23 August 2011
Determination:	30 August 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Gumbley says:

- a. Ms Selfe owes him unpaid holiday pay in respect of a period when she was his employer; and
- b. Ms Selfe owes him money which was overpaid to her as holiday pay during a period when she was his employee.

Whether Ms Selfe owes unpaid holiday pay

[2] By an agreement signed in April 2005 Mr Gumbley and Ms Selfe entered into an employment relationship in anticipation of their entry into a partnership arrangement. At the time Ms Selfe was trading as the Glen Eden Physiotherapy Centre. The partnership commenced in 2006, and it was common ground that the employment relationship terminated on the commencement of the partnership.

[3] Despite the date of signing the employment agreement, it was common ground that Mr Gumbley's period of employment was from July 2005 to April 2006. Mr Gumbley says he did not take any paid annual leave during that period, and that he is owed payment calculated at 6% of his total gross earnings for the period, or:

$$\$48,100 \times 6\% = \$2,886.$$

[4] Ms Selfe did not dispute this calculation. Instead she said she urged Mr Gumbley to take the leave several times, and that he could have raised and resolved the outstanding liability during the period of the partnership. She also said that the partnership took over the business as a going concern, including outstanding employee entitlements.

[5] However, even if the business was taken over as a going concern, the legal relationship between Ms Selfe as employer and Mr Gumbley as employee terminated and any outstanding obligations crystallised on the date of termination. Employee entitlements do not transfer automatically when the employer's business is sold as a going concern. Without the necessary express agreement to different effect, liability for the payment remained Ms Selfe's as the employer party. Having perused the partnership agreement and the agreement for sale and purchase of the business, and having heard from the parties, I am not satisfied there was such an agreement.

[6] Accordingly Mr Gumbley was entitled to the payment on the termination of his employment, and to make the claim he now has.

[7] Ms Selfe is therefore ordered to pay Mr Gumbley the sum of \$2,886 (gross).

Whether Ms Selfe owes money overpaid to her

[8] During the partnership Mr Gumbley slowly purchased Ms Selfe's share until Ms Selfe was no longer a partner and became an employee of Mr Gumbley's. The parties signed a written employment agreement on 1 April 2009, which took effect from that date. Mr Gumbley subsequently became the director and majority shareholder in the company which now operates the business formerly operated by the

partnership, although there has been no issue as to the identity of Ms Selfe's employer and Mr Gumbley has pursued this matter in his personal capacity.

[9] The dispute about whether Ms Selfe was overpaid concerns the correct calculation of her leave entitlements when her employment terminated. The relationship terminated within 12 months of its commencement. Ms Selfe was actually paid holiday pay of \$2,467.09 and statutory holiday pay of \$548.90. Mr Gumbley says Ms Selfe's holiday pay was not correctly calculated, and that she was not entitled to payment for the statutory holidays.

1. Holiday pay calculation

[10] Ms Selfe's entitlement to holiday pay should have been calculated as 8% x total gross earnings for the period, less any amount paid for annual holidays taken in advance.

[11] The wage and time record shows Ms Selfe's total gross earnings were \$26,456. The record also shows Ms Selfe was paid holiday pay of \$2,467.09 during her employment. Accordingly the calculation is:

$$[8\% \times \$26,456] - \$2,467.09 = (\$350.61).$$

[12] There did not appear to be errors in the calculations of the payments for Ms Selfe's annual holidays taken in advance, rather the above outcome is the effect of a drop in the number of hours worked and paid for towards the end of Ms Selfe's employment.

2. Payment for statutory holidays

[13] Ms Selfe was paid for:

- (i) the Good Friday public holiday in 2009; and
- (ii) the Christmas Day and New Year's Day public holidays in 2009 and 2010 respectively;

[14] Mr Gumbley deducted these payments when calculating Ms Selfe's total gross earnings. He said the Good Friday holiday occurred before Ms Selfe's employment began and the other two holidays occurred after it had ended.

[15] Good Friday fell on 10 April in 2009. The express terms of the employment agreement meant the employment relationship commenced on 1 April 2009. Ms Selfe was entitled to the payment she received.

[16] The precise date on which Ms Selfe's employment terminated is not free from doubt, but Mr Gumbley said Ms Selfe resigned in or about mid-December 2009. Ms Selfe denied resigning in December 2009 and said she confirmed her retirement in or about March 2010.

[17] It was common ground that in December 2009 there was no letter of resignation, and Ms Selfe did not state expressly to Mr Gumbley that she was resigning or otherwise state an intention that her employment was to terminate on a particular date. There was instead a continuation in a more generalised way of discussions that had already commenced regarding Ms Selfe's plans to retire.

[18] Ms Selfe then took a period of annual leave which had been planned in advance, and said she was intending to return to work in mid-January 2010. I accept that she sent an email message dated 14 January 2010 to Mr Gumbley in which she indicated she would prefer not to resume seeing patients until February. She referred again to her intention to retire and indicated that 'the time is right now'. I also accept that Mr Gumbley did not receive the message. Ms Selfe duly returned from her holiday, but found the workload was so light that there was little if any work for her to do. She confirmed her retirement shortly afterwards.

[19] There was not enough in the December discussions to amount to a resignation. The message of 14 January could have been construed as a resignation, although Ms Selfe said she intended only to indicate that her retirement was now imminent and that discussion was needed. In any event, I do not accept that Ms Selfe's employment had terminated by reason of her resignation in December – and before the Christmas-New Year period.

[20] Accordingly Ms Selfe was entitled to the payments she received for the Christmas Day and New Year's Day public holidays. The amounts should not have been deducted from Mr Gumbley's calculation.

3. Conclusion

[21] The total amount paid to Ms Selfe as annual leave in advance of her entitlement exceeds by \$350.61 the amount to which she would have been entitled on the termination of her employment had the leave not been taken.

[22] The payments in respect of annual leave taken in advance were correct at the time they were made. There is no provision in the Holidays Act 2003 for the recovery of monies overpaid in the circumstances of the overpayment to Ms Selfe, and accordingly I make no order.

Summary of orders

[23] Ms Selfe is ordered to pay to Mr Gumbley \$2,886 in unpaid holiday pay. She is further ordered to pay interest on this sum calculated at 5% pa from 1 April 2006 to the date of payment.

Costs

[24] Costs are reserved.

[25] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority