

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 173  
5425691

BETWEEN                      JACOB WILLIAM HARRIS  
   Applicant  
  
A N D                              WHITE CLIFFS FORESTS  
   LIMITED  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Gaylene Harris, Advocate for Applicant  
   William Sharpe, Advocate for Respondent  
  
Investigation Meeting:       28 February 2014 at Whangarei  
  
Submissions Received:       9 April 2014 from Applicant  
   11 April 2014 from Respondent  
  
Date of Determination:       6 May 2014

---

**FURTHER DETERMINATION OF THE AUTHORITY**

---

**The first determination**

[1] By determination dated 17 March 2014 and issued as [2014] NZERA Auckland 99 I dealt with the substantive issue between these parties but left it to the parties to engage with each other and agree the basis on which payments consistent with my determination, were to be made.

[2] The parties have been unable to resolve matters on their own terms and accordingly, in reliance on my reserving the right for either party to revert to the Authority for further orders, I am requested to fix the payments about which there is still disputation.

### **The claim**

[3] Mr Harris seeks payment of statutory holiday leave in the sum of \$3,478.00, payment of sick leave in the amount of \$660.00, payment of bereavement leave in the amount of \$432.00, payment of annual leave in the sum of \$365.60 and costs totalling \$4,396.50.

### **The response**

[4] White Cliffs offer includes an agreement on the statutory holiday pay claimed, an agreement on the amount of bereavement leave claimed, an offer on ordinary holiday pay at \$312.80 (some \$50 short of the claim made by Mr Harris) and an offer of \$500.00 as a contribution to legal costs.

### **Discussion**

[5] It will be apparent from the foregoing paragraphs that there is substantial agreement between the parties. Statutory holiday pay and bereavement leave are agreed and there is a difference of only around \$50 in relation to the appropriate payment of ordinary holiday pay. The reason for the difference in holiday pay calculation is that Mr Harris is claiming sick leave which is not accepted by White Cliffs. The issue here is partly one of documentation of the sick leave and partly a function of the way the employment was erroneously treated during the period in question.

[6] White Cliffs erroneously treated the employment as if it were casual employment and on that footing sick pay would not have been payable.

[7] Notwithstanding that, at the commencement of the Authority's investigation, White Cliffs conceded that, while the employment commenced on a casual basis, at some point during the employment, Mr Harris became a full time employee.

[8] In my substantive decision, I decided that Mr Harris had been a casual employee for three months but from 17 February 2011, became a permanent employee.

[9] In Mr Harris's submissions in respect to sick pay, I am satisfied that he is endeavouring to reflect the Authority's decision determining that he was a permanent employee from February 17, 2011 by making what amounts to a guesstimate (as he

himself accepts) of the amount of sick pay that he would have been entitled to receive had the employment been correctly treated at the relevant time.

[10] Submissions for White Cliffs on this point proceed on the footing that on production of suitable documentation, White Cliffs will alter their position. That suitable documentation might be evidence of having seen the doctor at the relevant time.

[11] Because Mr Harris has not produced that material to White Cliffs, I deduce that there is no such documentation; if there were, it would have been in his interests to produce it and as he struck me as a sensible young man, I imagine that the reason it is has not been produced is because it does not exist.

[12] That does not mean that Mr Harris has not taken sick leave during the relevant period and the only approach that I can properly take in the circumstances is to adopt the approach that Mr Harris himself has adopted of making a guess as to what time off he may have had for sick leave.

[13] The total claim in respect of sick leave is \$660.00 and of that amount, \$110.00 relates to one days sick leave which was, according to the submissions for Mr Harris, a days sick leave taken as a consequence of a work place accident and it is alleged that White Cliffs have the documentation to support that claim.

[14] For the purposes of determining this matter once and for all, I assume the correctness of that submission (notwithstanding it appears to be contradicted by White Cliffs' submission). Turning to the balance of the claim of \$550.00, I simply cut that in half on the basis that there was really no other way of treating the matter in the absence of any documentary evidence. It seems to me appropriate that the parties should share the loss in that regard.

[15] On that footing then, I determine that the total amount of sick pay owing is \$335.00.

[16] Having resolved that aspect, I am now in a position to determine the holiday pay entitlement which computes at \$339.60.

[17] That leaves the only substantive issue being the question of costs. White Cliffs have made an offer of \$500.00 towards the costs against the claim of \$4,396.50.

[18] Irrespective of how the costs claim is derived, the Authority's invariable practice is to review the reasonableness of the total costs and then assess whether in terms of the legal rules, it is appropriate to make an award of costs against one party in favour of another.

[19] In this case, Mr Harris says that he was forced to seek the assistance of the Authority to resolve matters because White Cliffs would not concede the point about the status of his employment. That view of matters may well, to some extent, be accepted by White Cliffs because they have made an offer to contribute to Mr Harris's costs in the sum of \$500.

[20] But it is important for me to emphasise the point that at the beginning of the investigation meeting, White Cliffs very properly conceded that they accepted Mr Harris was a permanent employee for most of the employment and their behaviour since the investigation meeting has been to attempt to resolve matters by agreement rather than take a confrontational stance.

[21] I accept Mr Harris's submission that it was necessary for him to approach the Authority to resolve matters and on that footing, notwithstanding the honourable behaviour of White Cliffs in making appropriate concessions and working collaboratively with Mr Harris to resolve matters after the hearing, it is appropriate that White Cliffs make a contribution to Mr Harris's costs.

[22] But in accordance with the Authority's invariable practice, the Authority must be satisfied that the costs claimed by the successful party are reasonable and the Authority must then determine what percentage of those costs ought to be contributed to by the other party. I make the point here that it is a rare case indeed where all the costs of a party are met by the other side and there is nothing in the present case which would encourage me to decide that this is a case where White Cliffs should meet all of the costs incurred by Mr Harris.

[23] The usual way that the Authority deals with costs applications is by the application of what is called the daily tariff. The daily tariff is \$3,500 for a one day hearing. The way this works in practice is that where an ordinary investigation in the Authority takes a full hearing day, the successful party can usually expect to receive a contribution towards their costs of \$3,500. This amount is the starting point for the

Authority in reflecting on whether there are any other factors which would encourage an uplift in that amount or a reduction in that amount.

[24] Where the investigation meeting takes less time than a full hearing day, then the amount is reduced proportionately. That of course is the position in the present case. The matter was dealt with in under two hours of hearing time. Moreover, there is nothing in the behaviour of either party which would encourage me to either add to or reduce the costs award that would otherwise be appropriate. What I mean by this is that both parties behaved well at the investigation meeting, both assisted me to identify the salient facts, and both parties have behaved appropriately since the investigation meeting as is evidenced by their substantial agreement on the outstanding wages payments owed to Mr Harris.

[25] Applying the daily tariff approach to the length of time that this investigation meeting actually took, I think the appropriate finding for me to make is to direct that White Cliffs is to pay to Mr Harris the sum of \$1,000 as a contribution to his costs. I am satisfied that is all that the law allows me to award. The fact that Mr Harris has spent a great deal more than that in prosecuting his case does not entitle him to a larger sum by way of contribution. It simply places him in the same situation as other successful litigants who, unless there are unusual or exceptional circumstances, will not have all of their costs reimbursed by an unsuccessful party in the Authority hearing.

### **Determination**

[26] I direct that the following payments are to be made by White Cliffs to Mr Harris:

- (a) Statutory holiday pay at \$3,478.00 gross;
- (b) Sick pay at \$335.00 gross;
- (c) Payment for bereavement leave at \$432.00 gross;
- (d) Holiday pay at \$339.60 gross;
- (e) A contribution to costs of \$1,000.00.

[27] Of course, with the exception of the costs contribution which is a net sum, the other amounts are gross payments and subject to PAYE income tax in the usual way.

James Crichton  
Member of the Employment Relations Authority