

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 55  
5392794

BETWEEN

HOWARD'S LODGE  
LIMITED  
Applicant

AND

LYNETTE RUSSELL, A  
LABOUR INSPECTOR OF  
THE MINISTRY OF  
BUSINESS, INNOVATION  
AND EMPLOYMENT  
(formerly the Department of  
Labour)  
Respondent

Member of Authority: P R Stapp

Representatives: Grant Adams, for the Applicant  
Lynette Russell, for the Respondent

Investigation Meeting: 16 April 2013 at Ohakune

Submissions Received: 17 April 2013

Determination: 15 May 2013

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**DETERMINATION OF THE AUTHORITY**

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**Application for an objection to an improvement notice**

[1] This is an objection from Howard's Lodge Limited (HLL) to an improvement notice issued by a Labour Inspector.

[2] HLL claims that the improvement notice is not necessary because the Inspector has wrongly interpreted the requirements of the Holidays Act 2003 in regard to the transference and payment of public holidays and a day in lieu. At the centre of the issues the applicant has challenged the Labour Inspector's determination of what is an otherwise working day in regard to this matter.

## Issues

[3] The primary issue in this matter is whether the days claimed by the Labour Inspector for the payment of public holidays, a payment for time and a half for time worked on a transferred public holiday and an alternate day in lieu are required to be met by HLL.

[4] The relevant provisions of the Holidays Act 2003 include:

### ***45 Transfer of public holidays over Christmas and New Year***

*(1) For the purposes of this sub-part, if any of the public holidays listed in s.44(1)(a) to (d):*

- (a) Falls on a Saturday and the day would otherwise be a working day for the employee, the public holiday must be treated as falling on that day:*
  - (b) Falls on a Saturday and the day would not otherwise be a working day for the employee, the public holiday must be treated as falling on the following Monday:*
  - (c) Falls on a Sunday and the day would otherwise be a working day for the employee, the public holiday must be treated as falling on that day:*
  - (d) Falls on a Sunday and the day would not otherwise be a working day for the employee, the public holiday must be treated as falling on the following Tuesday.*
- (2) To avoid doubt, this section does not entitle an employee to more than four public holidays for the days listed in s.44(1)(a) to (d).*

[5] The public holidays listed in s.44(1)(a) to (d) are for the purposes of Mr Baker's complaint with the Labour Inspector: Christmas Day, Boxing Day, New Year's Day and 2 January.

[6] In addition the following apply:

### **48 Compliance with s.46**

- (1) If a public holiday falls on the day that would not otherwise be a working day for an employee, s.46 is complied with if –*
  - (a) the employee does not work on the day; or*

- (b) *the employee works on any part of the day and the employer pays the employee in accordance with s.50.*
- (2) *If a public holiday falls on the day that would otherwise be a working day for an employee, s.46 is complied with if –*
  - (a) *the employee –*
    - (i) *does not work on that day; and*
    - (ii) *the employer pays the employee in accordance with s.49; or*
  - (b) *the employee –*
    - (i) *works (in accordance with his or her employment agreement) on any part of that; and*
    - (ii) *the employer pays the employee in accordance with s.50; and*
    - (iii) *the employer provides the employee with an alternative day under s.56.*

**49. *Payment of employee does not work on public holiday***

*If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay (or average daily pay) for that day.*

**The facts**

[7] An employee (Mr Colin Baker) of HLL made a complaint to a Labour Inspector (Cheryl Put) that he had not been paid holiday pay for public holidays on 25 and 26 December 2011 and 3 January 2012. Mr Baker has an individual employment agreement (the agreement) with HLL. The individual employment agreement confirms that Mr Baker is paid \$18 per hour. He is engaged as a bus driver to perform duties as directed by the employer (HLL). He was based at HLL's lodge in National Park. His hours of work were as follows under the hours of work clause of the agreement:

**5. Hours of work**

- 5.1 *You will work between Monday and Sunday inclusive. Your hours and days of work will be dependent on demand and weather.*
- 5.2 *Our industry demands flexible work practices, so your hours of work may vary according to operational requirements.*

- 5.3 *You agree the Employer may vary your working hours as it needs, and the efficient operation of its business requires. Where practical the Employer will discuss any proposed change to your usual working arrangements with you in advance. You accept this provision is fundamental to the ongoing relationship and that it is absolutely necessary to achieve competitiveness and therefore enhance your job security.*
- 5.4 *Daily start times must be adhered to so that you are available to provide coverage on a reliable and punctual basis.*

[8] In addition, the individual employment agreement made provision for public holidays as follows:

**7. Public holidays**

- 7.1 *The days listed below are public holidays. You will be entitled to holiday pay at your relevant daily rate pursuant to the Holidays Act 2003 if you would normally work on that day.*

<i>New Year's Day</i>	<i>Second day of January</i>
<i>Anniversary Day</i>	<i>Waitangi Day</i>
<i>Good Friday</i>	<i>Easter Monday</i>
<i>Anzac Day</i>	<i>Labour Day</i>
<i>Christmas Day</i>	<i>Boxing Day</i>
<i>The birthday of the reigning sovereign</i>	

- 7.2 *If there are any changes to the legislation governing Public Holidays the days listed above will be adjusted accordingly.*
- 7.4 *You will not be paid for any Public Holiday that falls on the day of the week on which you do not normally work.*
- 7.5 *Where you actually work on a Public Holiday you will be paid time and a half.*

[9] In 2011, 25 December 2011 and 26 December 2011 fell on a Sunday and Monday respectively. The Inspector in Mr Baker's circumstances says the public holiday is not transferable but to be paid on the day it falls under the employment agreement because it would have been an otherwise working day for him. Likewise New Year's Day 1 January 2012 fell on a Sunday and was transferable if it was not an otherwise working day (to the following Tuesday), but is paid on the day it falls for Mr Baker. There is no claim being made for 1 January 2012 because there was bad

weather, but the inspector says that payment is due for a public holiday transferred to Tuesday 3 January as a public holiday.

[10] The wage and time record shows that Mr Baker worked on 2 January, also a public holiday, for 12.5 hours. This seems for whatever reason to have been missed by the Inspector because she believed it was a bad weather day and Mr Baker did not work for that reason. Also, Mr Baker worked 3.5 hours and was paid ordinary time on Tuesday, 3 January 2011. My focus therefore is on 25 and 26 December 2011 when the public holidays fell and 3 January 2012 a transferred public holiday that apply to the improvement notice.

[11] Mr Baker was due to work on 25 and 26 December 2011, but for some reason and it is unclear at whose initiative, Mr Baker did not work on 25 and 26 December 2011. Apparently he worked on 27 December for 4 hours according to information obtained by the Inspector from Mr Baker, and then Mr Baker did not return to work until 2 January 2012. There is no evidence that demands and/or the weather prevented any work from occurring on 25 and 26 December 2011 as per the public holiday's clause of the agreement above and for him to have worked. The Inspector believes that work was available and was carried out by someone else on both days while Mr Baker had the days off. This has not been challenged by Mr Adams one of two directors of HLL, but Mr Adams has doubts about the reason for Mr Baker's unavailability. The Inspector concluded the holidays were otherwise working days for Mr Baker for payment, and non-transferable (s 45 (1) (c) of the Holidays Act). The real issue is whether Mr Baker is entitled to be paid for the Christmas Day and Boxing Day.

[12] The pay records that have been produced indicate that Mr Baker started his employment with HLL on 27 February 2009. The record confirms that he did not work on 25 and 26 December 2011. The wage time and holiday record shows a total of 9.5 hours worked for the week ended 25 December 2011. There is no record of him working 4 hours on 27 December 2011. Mr Baker did work on 2 and 3 January 2012. His average hours of work varied over the time of his employment with HLL. Although there were no rosters the work patterns indicate that Mr Baker did not work every Sunday. It appears he was paid ordinary time only for 2 and 3 January.

[13] Mr Adams was contacted by the Department of Labour (the Department) at the time (now Ministry of Business, Innovation and Employment (MBIE)) following

up Mr Baker's complaint. The Department's Labour Inspector acting on the matter at the time made further inquiries of Mr Baker and Mr Adams by telephone and followed that up by email and then the correspondence leading up to the improvement notice.

[14] The calculation for the public holiday pay could not be done at the time and before the Authority's investigation because the Labour Inspector did not obtain the full wage and time records. During the Authority's investigation HLL calculated that the sums as being \$148.50 for any holiday pay and \$45 for the work on 3 January if any extra payment is required (by email). I hold that the rate of  $\frac{1}{2}$  time ordinary pay for the 3.5 hours worked amounts to \$31.50. The Labour Inspector has not commented on the calculations provided by Mr Adams and I am uncertain as to whether the rates have been accepted or not. I hold that the rate of  $\frac{1}{2}$  time ordinary pay for the 3.5 hours worked amounts to \$31.50 90 based on half the rate of \$18 per hour).

[15] There is a dispute between both parties as to whether Mr Adams was properly requested to provide wage time and holiday records before the Authority's involvement in the matter. The original wage and time book has only emerged during the Authority's investigation into this matter. There does not appear to be any reference or any formal letter following up a request for such records by the Inspector prior to the Authority's investigation. This is fundamental to any claim and inspectors need to ensure that requests for the records are properly made, especially to avoid later arguments.

[16] There was no work on Sunday 1 January 2012 because of bad weather. This is the explanation given why Mr Baker has not claimed holiday pay for the public holiday on 1 January 2012. Therefore it must follow that under his employment agreement he would not have worked, and thus the issue is one as to whether he is entitled to the payment for the transferrable public holiday on 3 January 2012. I accept that the Inspector believes it is a public holiday for Mr Baker, but Mr Adams has submitted as there was bad weather for work not to be available on 1 January Mr Baker would not have worked. I have no explanation about the circumstances of the work on 2 January 2012 that could have been subject to a claim because it was a public holiday that was worked.

[17] The Inspector and Mr Adams discussed the matter but between them they were not able to settle the argument on the payment of public holidays, the payment of time and a half and the availability of an alternative day in lieu for the work on 3 January 2011.

[18] What followed was that another Inspector (Lynette Russell) wrote to Mr Adams on 13 April 2012 and concluded that Mr Baker was entitled to be paid either his relevant daily pay or average daily pay for Christmas Day and Boxing Day. She also observed that Mr Baker was entitled to be paid a rate of an extra ½ ordinary time for his hours actually worked on 3 January 2012.

### **The Employment Relations Act 2000**

[19] The powers of a Labour Inspector to issue an improvement notice are in s.223D of the Employment Relations Act 2000 (the Act). The Act provides as follows:

#### **223D Labour Inspector may issue improvement notice**

- (1) *A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.*
- (2) *An improvement notice issued under subsection (1) must state –*
  - (a) *The provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and*
  - (b) *The Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provisions; and*
  - (c) *The nature and extent of the employer's failure to comply with the provision; and*
  - (d) *The steps that the employer could take to comply with the provision; and*
  - (e) *The date before which the employer must comply with the provision.*
- (3) *An improvement notice may state the nature and extent of the loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).*

- (4) *An improvement notice may be issued –*
- (a) *By giving it to the employer concerned; or*
  - (b) *If the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.*
- (5) *An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.*
- (6) *An improvement notice may be enforced by the making by the Authority of a compliance order under s.137.*

**223E *Objection to improvement notice***

- (1) *An employer may, within 28 days after the improvement notice is issued to the employer, lodge with the Authority an objection to the notice.*
- (2) *The function of the Authority in respect of an objection is to determine –*
- (a) *Whether the employer is failing or has failed to comply with a specified provision of the relevant Acts; and*
  - (b) *The nature and extent of the employer's failure to comply with the provision; and*
  - (c) *The nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).*
- (3) *The Authority may confirm, vary, or rescind the improvement notice as the Authority thinks fit.*

[20] The Labour Inspector may withdraw the improvement notice at any time.

[21] The improvement notice issued by the Labour Inspector is dated 31 July 2012 and was sent to the employer on 1 August 2012. Mr Adams acknowledged that he is aware of and understands the content of the improvement notice issued under s.223D of the Act by the Labour Inspector.

[22] The Labour Inspector advised the employer to take steps to comply by using an improvement notice. These were, and I quote verbatim:

- *Pay Colin Baker his relevant daily pay or average daily pay for Sunday 25 December 2011 and Monday 26 December 2011.*
- *Pay Colin Baker time and a half for the hours worked on Tuesday 3 January 2012 less payment already received for that day.*
- *Record Colin's entitlement to one alternative holiday in the holidays and leave record pertaining to Colin's employment.*

[23] The Inspector also required HLL to provide information to the Inspector as evidence of the steps taken to comply with the above requirements:

*The following information is required from the company as evidence of steps taken:*

- (1) *A copy of the completed calculation of the relevant pay, daily pay or average daily pay (whichever is applicable), for Sunday 25th December 2011 and Monday 26th December 2011.*
- (2) *A copy of the completed calculation of the balance of time and a half payment for 3rd January 2012.*
- (3) *Evidence of payment of the amounts due to the employee by way of either proof of credit to Colin Baker's bank account or written acknowledgment of receipt by the abovenamed employee in the event that the payment is made in cash or by cheque.*
- (4) *Evidence of the crediting of one alternative holiday by providing the holiday records.*

[24] The Inspector requested the compliance to be undertaken by 5pm on 27 September 2012.

[25] To date, Mr Adams confirms that he has not done any of the above for compliance with the Inspector's orders and/or opinion in regard to the matter. Put simply, he disagrees with the interpretation of the Holidays Act held by the Inspector and he is not abiding by the orders of the improvement notice.

### **Determination**

[26] I hold that the Inspector reasonably believed that HLL was not complying with the Holidays Act to issue an improvement notice based on the complaint made by Mr Baker. The Inspector was entitled to rely on the information from the applicant's copy of the employment agreement and other information he provided, and from the discussions held with Mr Adams.

[27] During the Authority's investigation Mr Adams submitted that Mr Baker was not always available on Sundays, and the wage time and holiday record supports him. Apparently Mr Baker also had other arrangements whereby he could work elsewhere at other times, but there has been no direct evidence of this claim. This would mean that Mr Baker was not always available for work and would have chosen whether or not to work.

[28] Mr Adams is correct that the requirement for Mr Baker to work Monday to Sunday seven days a week must be considered in terms of his availability to work because it is qualified by demand and weather. It must also be considered in terms of his entitlement to public holidays and the Holidays Act.

[29] Mr Baker had work allocated for the days prior to the public holidays. He apparently chose to take his holidays. His rights in this regard exist under the employment agreement that provide work for Monday to Sunday and public holidays. No arrangements were put in place otherwise, except by the employer to cover for Mr Baker. This is entirely explainable given the nature of the business working around the clock Monday to Sunday. Presumably there was a demand for the work, and the weather was good. It is not at all clear whether Mr Baker's reason for time off was for his public holidays or some other reason in making himself unavailable for work. The inference can be taken that there was an agreement for Mr Baker not to work on the two days and other arrangements were made to cover for him to enable him to take his public holidays. Thus, there was work available and he would have otherwise worked but for the public holidays.

[30] There is no evidence to challenge the Inspector's conclusion based on Mr Baker's information that another person drove the bus on both days. Other factors in the matter include:

- (i) The records show that Mr Baker's work with HLL was sufficiently frequent and regular for the time that he had been working for HLL, but with variable hours of work. This is supported by the employer's wage and time records. It is also supported by the employment agreement.

- (ii) Mr Baker's holiday pay has been calculated as a permanent employee, although he was working hours as required and subject to demand and weather.
- (iii) Mr Adams could not recall the circumstances about the days.
- (iv) The inspector's information is that Mr Baker apparently worked 4 hours on 27 December 2011 and is not a public holiday for Mr Baker because Sunday 25<sup>th</sup> was an otherwise working day and was not transferrable and 26 December was Boxing Day.
- (v) The wage time and holiday record shows the payment of hours for the week ended 25 December 2011.
- (vi) The inspector's information and the wage time and holiday record shows that Mr Baker worked on 2 January 2012.

[31] The parties in the employment relationship are bound by the Holidays Act notwithstanding the clause of the employment agreement that provides for public holidays not to be paid on the day of the week on which Mr Baker would not normally work. HLL cannot contract out of the Holidays Act and I am hold that Mr Baker would have otherwise worked on the days involved. The employment agreement incorporates the provisions of the Holidays Act for public holiday entitlements. Mr Baker is entitled to public holidays for 25 and 26 December 2011 as otherwise working days and they need to be calculated and assessed properly.

[32] Mr Adam's says that the payment involves Mr Baker double dipping. The improvement notice does not make a claim for more than the entitlement for 2 public holidays for Christmas 25 and 26 December 2011. I am not satisfied that this is a case of double dipping that has to be considered in terms of Mr Baker not receiving more than 4 public holidays under the Holidays Act for Christmas and New Year. The law requires Mr Baker to be paid for his public holidays and work on any public holidays that were otherwise working days.

[33] I confirm my earlier finding that Mr Baker would not have worked on Sunday 1 January because of bad weather and was not paid, but he is entitled to the transference of the public holiday on 3 January as per s 45 (1) (d) of the Holidays Act, also a normal working day under the terms of his agreement. Also, any payment for 2

January, a public holiday, and a day in lieu may have been overlooked by the Inspector. Work on the public holiday (2 January 2012) also entitles Mr Baker to an extra payment and an alternative holiday in lieu. I note that Mr Baker has now left the employment. Initially the Labour Inspector requested HLL to document the entitlement to an alternative holiday for 3 January in the records. The entitlement to alternative holidays was an issue raised in the improvement notice.

[34] I have carefully considered what to do under s 223E of the Employment Relations Act in varying and or rescinding the improvement notice. I have received no suggestions on varying the improvement notice given that it has expired, there are no calculations adequately completed and that HLL should have a further opportunity to comply with making a payment and before any further action is taken. Varying the improvement notice seems to be the most practicable way to resolve the matter given the role of the Authority under s 223E (2) of the Act, although if there remains any outstanding payments there is always a holiday pay claim able to be made.

[35] I have decided to vary the improvement notice under s 223E of the Employment Relations Act to resolve this matter as to Mr Baker's entitlements. I hold that Mr Baker is entitled to the payment of public holidays on 25 and 26 December 2011 pursuant to s 45 (*Transfer of public holidays over Christmas and New Year*) of the Holidays Act and that they were otherwise working days for him. Also he is entitled to the extra rate of  $\frac{1}{2}$  time ordinary pay per hour for the 3.5 hours worked on 3 January 2012 under the Holidays Act. He is also entitled to the extra  $\frac{1}{2}$  time ordinary pay per hour for the 12.5 hours worked on 2 January 2012 under the Holidays Act.

[36] I vary under s 223E of the Holidays Act the Labour Inspector's improvement notice dated 31 July 2012 as follows: Howards Lodge Limited is required to:

- i. Complete payment to Mr Baker of \$148.50 for 25 and 26 December 2011 public holidays. The proof of payment and details and calculations of this sum are to be provided to the Labour Inspector (copied to Mr Baker) by 20 June 2013. I permit any correction to the sum.
- ii. Pay Mr Baker the extra  $\frac{1}{2}$  time ordinary pay by my calculation \$112.50 gross for 2 January 2012, being 12.5 hours he worked on the public holiday. The proof of payment of this sum is to be provided to the Labour Inspector (copied

to Mr Baker) by 20 June 2013. I permit any correction to the sum, but details and calculations need to be provided to the Inspector by 20 June 2013.

- iii. Pay Mr Baker the extra  $\frac{1}{2}$  time ordinary pay by my calculation \$31.50 gross for 3 January 2012 being 3.5 hours he worked. The proof of payment of this sum is to be provided to the Labour Inspector (copied to Mr Baker) by 20 June 2013. I permit any correction to the sum, but details and calculations need to be provided to the Inspector by 20 June 2013.
- iv. Pay Mr Baker his entitlement to 2 alternative days in lieu for 2 and 3 January 2012 being days Mr Baker worked on public holidays and to provide proof of payment and the details of the calculations by 20 June 2013. The rate must not be less than the relevant daily pay (or average daily pay) for the last day of employment. I leave this for the parties because the amount needs to be reconciled with the wage and time records for the last day of employment and the holiday pay paid when the employment finished.

### **Costs**

[37] Costs are to lie where they fall since it involves the parties' executive time in preparing and attending to the Authority's investigation.

P R Stapp  
Member of the Employment Relations Authority