

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 179
5386049

BETWEEN TONY JACKSON
 Applicant

AND TSL NELSON LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Shayne Boyce, Advocate for Applicant
 Kay Chapman, Advocate for Respondent

Investigation Meeting: 8 March 2013 at Nelson, 28 June 2013 by telephone and 9
 August 2013 at Nelson

Submissions received: 2 and 22 August 2013 from Applicant
 14 August 2013 from Respondent

Determination: 28 August 2013

DETERMINATION OF THE AUTHORITY

- A. The respondent is ordered to pay to the applicant the gross sum of \$19,976.56 in respect of time off in lieu that was accrued but untaken at the time of his employment ending.**
- B. The respondent is ordered to pay to the applicant the further gross sums of \$3,000 and \$1,630 pursuant to sections 24 and 25 of the Holidays Act 2003 respectively (less any sum already paid under s.25).**
- C. The applicant does not have a personal grievance for unjustified disadvantage and the respondent did not breach its duty of good faith to the applicant.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Jackson seeks arrears of wages in relation to 756.25 hours of time off in lieu (TOIL) which Mr Jackson says he accrued but was prevented from taking prior to his resignation. He asserts that the failure to pay him the TOIL amounts to a breach of the Wages Protection Act 1983.

[2] Mr Jackson also claims that he is owed in relation to 12 days' accrued but untaken annual leave which he claims was unlawfully deducted from his final pay. He asserts that the failure to pay him the holiday pay amounts to a breach of the Holidays Act 2003.

[3] Mr Jackson asserts that the failures to pay him what he says is due also amount to an unjustified disadvantage in his employment, amounting to a personal grievance, pursuant to s.103(1)(b) of the Employment Relations Act 2000 (the Act) and a breach of the duty of good faith contrary to s.4(1) of the Act.

[4] The respondent denies that Mr Jackson had accumulated any TOIL, asserts that, even if he had, there was no agreement that untaken TOIL would be paid out upon termination, and claims that the 12 days of annual leave had been taken by Mr Jackson and not accounted for in the annual leave records, and so was lawfully deducted from the final pay.

Brief account of the events leading to the dispute

[5] Mr Jackson commenced working for the respondent (which, at the time of Mr Jackson's recruitment, was known as Titan Slicer Limited) on 16 August 2010. The respondent manufactured meat slicing equipment which it sold throughout New Zealand and overseas. Mr Jackson, a qualified engineer, was recruited by the respondent as a customer service technician, which essentially meant that he assisted in the maintenance and manufacture of high quality food processing machinery. This involved some travel around the country and overseas.

[6] Mr Jackson and the managing director of the respondent company, Mr Marr, had worked together previously and Mr Jackson knew at the time of his recruitment that the role would require him to work many long hours over and above the weekly base hours (although what the agreed base hours figure was is disputed between the

parties; see below). It is Mr Jackson's evidence that, accordingly, he discussed and agreed with Mr Marr some form of recognition of the hours that he would have to work over and above his weekly base hours; namely, a time off in lieu arrangement.

[7] It is Mr Jackson's evidence that he was given an employment agreement (which was erroneously in the name of his supervisor, Mr Whiteside, rather than in Mr Jackson's name), together with a document entitled *Personal addendum to individual employment agreement*. Mr Jackson did not sign the employment agreement and says that the addendum originally stated that the hours of work would be *based on 50 hours per week*, (the 50 hours Addendum) and that another addendum was later given to him by Mr Marr which had the figure of 50 hours per week changed to 40 hours per week. This personal addendum was signed by Mr Marr and Mr Jackson on 26 July 2010 (the 26 July Addendum). The relevant clause in that addendum states as follows:

HOURS OF WORK: *Titan Servicing Work As required and as agreed between both parties. Customer Service Technician: Monday To Sunday 5.30am To 11.30pm Based On 40 hours Per Week.*

[8] It is Mr Jackson's evidence that, once he started to work for the respondent, as predicted, he and his colleagues were working very long hours. He said in evidence that:

I put in these hours under the understanding from verbal agreements and discussions between Sean [Mr Marr] and myself that I would be able to take accumulated hours worked over and above my contracted amount, as time off in lieu, and that I would be paid in some form for additional hours if for whatever reason I resigned from Titan. There is no way I would have worked an additional 750 hours or thereabouts in the knowledge that I would never be paid for them or have the opportunity to take them as time off in lieu.

[9] Mr Jackson said that he did not have the time or opportunity to take accumulated TOIL because of the hours he had to put in. He also said that, before he started to work for the respondent, he had been told that there was no on-call roster as Mr Marr and another director, Mr Eyles, did the after-hours calls. However, early in 2011 an on-call roster appeared and he was the only non-shareholder put on the roster. Mr Jackson said that, by March 2012, he felt *completely burnt out, stressed and was not sleeping well*. He therefore approached Mr Marr and told him he was thinking about resigning, and then asked how and when his TOIL hours would be paid to him. Mr Marr told him that *we don't pay out lieu time*. Mr Jackson's evidence was that *this came as a complete show stopper for me*.

[10] As a result of this information, Mr Jackson decided not to work any additional hours over and above his contracted amount, or to be on call. He eventually gave notice of his resignation on 16 April 2012, worked four weeks' notice and left. During his notice period Mr Jackson received communications from the payroll administrator for the respondent about his outstanding holiday pay. Initially he was told that he had 21 days' owing. However, he was eventually told that 13 of these days had already been taken by him, and misrecorded in the respondent's system as *training*. Accordingly, he was only entitled to eight day's holiday he was told. Mr Jackson asserted that the 13 days' holiday had been wrongly deducted. The respondent eventually acknowledged this in 2013 with respect to one day, which is why Mr Jackson now seeks payment for 12 days. Mr Jackson also asserts that he is legally entitled to be paid for the TOIL he accrued.

Additional evidence

[11] After the Authority's investigation meeting that took place on 8 March 2013, on 24 June 2013 Ms Boyce, on behalf of Mr Jackson, sent to the Authority a copy of the 50 hours Addendum. This document was dated 6 June 2010 but was not signed. Ms Boyce also sent in a copy of another addendum signed by the parties on 20 December 2010 (the 20 December Addendum). It stated the same wording with respect to Hours of Work as the 26 July Addendum cited above, but identified the company as *Titan Systems International Limited*. Ms Boyce said that these two documents had been found by Mr Jackson since the first investigation meeting.

[12] During the taking of Mr Eyles' evidence on 28 June 2013, Mr Eyles explained that Titan Systems International Limited had been set up as a marketing arm, to trade in the USA, but that it never actually did so. It was, therefore, a shell company. Mr Eyles could not be certain why the 20 December Addendum had that name on it, but assumed that it was because Mr Jackson was to be part of that marketing initiative. I am satisfied that no new employment agreement was entered into as between Mr Jackson and Titan Systems International Limited.

[13] On 28 June 2013 Ms Chapman, on behalf of the respondent, said that Mr Marr asserted that the 50 hours Addendum had been fabricated by Mr Jackson in order to assist his case before the Authority. It is not clear why Mr Jackson would do so, given that he was arguing that the threshold for TOIL to be earned was 40 hours a week but, as this was a serious allegation, I undertook to investigate it further.

However, the respondent later indicated that it no longer wished to pursue the allegation. For the record, in the absence of any evidence to indicate that the 50 hours Addendum had been fabricated, I accept it as authentic.

The issues

[14] The Authority has to determine the following issues:

- a. What was the nature of the agreement between the respondent and Mr Jackson regarding TOIL? If TOIL was agreed:
 - i. was TOIL to accrue on an hour for hour basis or on a more flexible, discretionary basis?
 - ii. What were the weekly threshold hours to be worked, above which TOIL would accrue?
 - iii. Was Mr Jackson entitled to be paid for accrued TOIL not taken at the end of his employment?
 - iv. How much TOIL in arrears is Mr Jackson due?
- b. What holiday pay is Mr Jackson owed?
- c. Did Mr Jackson suffer an unjustified disadvantage in his employment?
- d. Did the respondent breach its duty of good faith towards Mr Jackson?

What was the nature of the agreement between the respondent and Mr Jackson regarding TOIL?

[15] It is Mr Jackson's evidence that he had a discussion with Mr Marr in which Mr Marr agreed that Mr Jackson would accumulate time off in lieu for work carried out over and above his base hours. As the 26 July 2010 Addendum stated that his base hours were 40 hours per week, Mr Jackson assumed that this meant he would accumulate one hour of TOIL for every hour of work over and above 40 hours per week.

[16] An email was sent by Mr Jackson to Mr Marr prior to the 26 July 2010 Addendum being signed. The email was dated Sunday, 9 May 2010 and included the following text:

Hey Sean

Hope you had a good weekend, I guess you in the kitchen now being Gordon with the whanau coming for dinner.

Thanks for dropping contract off on Friday. I noticed there is nothing in there in regards to time worked over 50 hrs/wk. Would be good to get something on paper to safeguard both parties as I'm well aware of the hours required in getting machines out on time as Johnny and yourself lost out big time under Crofty, i.e. you end up working for a very low hourly rate.

[17] Mr Jackson sent another email to Mr Marr two days later and on 11 May Mr Marr responded in the following terms:

Sorry worked all night Nzks [sic] won't be back till Friday night go and see Neil Whiteside he will show you how time in lieu works and is recorded any more questions give me a ring.

[18] It is Mr Jackson's evidence that he did speak to Mr Whiteside (the respondent's then commercial manager and a shareholder at the time) who, effectively, agreed that Mr Jackson would be entitled to earn TOIL in respect of each hour worked over 40 hours.

[19] It is Mr Whiteside's evidence that he and other staff working for the company earned TOIL but that the arrangements were different for other staff. For example, Mr Whiteside's own situation was that he started off earning TOIL whenever he worked over 40 hours a week; this then increased to whenever he worked over 45 hours a week, and, finally, when he worked over 50 hours a week. Mr Whiteside said that two other staff working for the respondent received TOIL when they worked over 50 hours a week.

[20] It seems, however, that the situation of Mr Whiteside and the other two staff is not strictly comparable with that of Mr Jackson because Mr Jackson was an employee whereas Mr Whiteside and the two other staff Mr Whiteside referred to were all contractors.

[21] There is no doubt from the email sent by Mr Marr dated 11 May 2010 that the respondent company recognised TOIL as a means of addressing the working of long

hours. Mr Marr had clearly directed Mr Jackson to speak to Mr Whiteside about the issue. Both Mr Jackson and Mr Whiteside accepted that an agreement was reached between the parties that Mr Jackson would be able to accrue TOIL. Mr Whiteside's evidence was that it was *common knowledge* that Mr Jackson was entitled to accrue TOIL, based on a base weekly rate of 40 hours.

[22] Ms Chapman for the respondent points out that there are no clauses in the employment agreement or the various addenda *relating to over time, lieu time or payment of lieu time or extra hours worked at the termination of employment*. Whilst I accept that there was no agreement between the parties that Mr Jackson would receive overtime payments, and further, that he was to be remunerated by way of a salary, rather than an hourly rate of pay, I do not accept that there was no agreement that Mr Jackson would be entitled to earn time off in lieu. Whilst the employment agreement and addenda are silent about TOIL, Mr Marr's email of 11 May 2010 makes quite clear that the company did recognise TOIL and, it can be inferred further without any straining of interpretation, that Mr Jackson would be eligible for it. The details were to be communicated by Mr Whiteside.

[23] Ms Chapman relies on a clause (clause 1.2) in the employment agreement produced to the Authority that states that the terms contained in it, in the workplace rules and in the personal addendum *represent the entire terms and conditions that operate between the parties with respect to the employee's employment*. Ordinarily, this would be a powerful point against importing into the arrangement additional terms not expressly set out in the written documents. However, the employment agreement relied upon by Ms Chapman bears the name of Mr Whiteside, not Mr Jackson, and has not been signed by Mr Jackson. In my view, given the contents of his email dated 9 May 2010, it would be dangerous to assume that Mr Jackson regarded himself as bound by clause 1.2 with the result that his oral agreement with Mr Marr about his right to earn TOIL would not be binding on him.

[24] I accept Mr Jackson's evidence that he would not have accepted the role, knowing what long hours he would be working, without an agreement that he would be able to earn TOIL. In short, I believe that a valid and binding agreement was reached between Mr Marr and Mr Jackson resulting in Mr Jackson being entitled contractually to accrue TOIL. What remain to be determined are the details of the arrangement.

Was TOIL to accrue on an hour for hour basis or on a more flexible, discretionary basis?

[25] Mr Marr, in his evidence, effectively denied that any arrangement was agreed with Mr Jackson which would allow him to get one hour of TOIL in respect of an hour worked over his base hours. His evidence, partly contained in his written brief of evidence, was as follows:

I consider an average of 50 hours per week to be a normal expectation of employees on salary. This is based on my own experiences and statistics New Zealand data which reports 40% of New Zealand men between the age of 35-54 work in excess of 50 hours per week. The expectation of 50 hours per week before lieu time is considered was discussed, and this is reflected in Mr Jackson's email dated 9 May 2010 (supplied by the Applicant 16 November 2012).

...

At no time prior to the March 2012 meeting, did Mr Jackson and I discuss time in lieu being paid out. I would not agree to this for a salaried employee.

In the email from Mr Jackson to me, dated 9 May 2010, Mr Jackson wrote "I notice there was nothing in there (the agreement) in regards to time worked over 50 hrs/wk". This demonstrates Mr Jackson and I discussed the 50 hours per week expectation in relation to lieu time and Mr Jackson accepted lieu time was only available for hours worked on average over 50 hours per week.

Mr Jackson worked on average 49.02 hours per week.

...

We operated a flexible "time in lieu" arrangement. This was not a term of Mr Jackson's Employment Agreement and was never intended to be. The reference in the email of 11 May 2010, to discuss how time in lieu works with Mr Whiteside is further evidence of this. I did not agree to time in lieu becoming a term of his employment agreement, rather by discussion with Mr Whiteside the flexible time in lieu system. Where employees work significant additional hours, they may take time from work in lieu on occasion. This was not a one hour for one hour arrangement. If it had been Mr Jackson would have been an hourly paid employee.

[26] Mr Marr's evidence to the Authority, when asked to explain how the *flexible "time in lieu" arrangement* worked, was that if Mr Jackson worked for 24 hours straight, for example, he could take the following day off, subject to the requirements of the business. Mr Marr said that it was his decision as to whether Mr Jackson could take time off in lieu and that Mr Marr gave Mr Jackson considerable flexibility in any event as he allowed Mr Jackson to leave work at 3pm to pick up his young daughter.

Mr Marr said that Mr Jackson would, sometimes, not go back to work that day or sometimes would return to work an additional shift, as the business needs demanded.

[27] When I asked Mr Marr to explain how the averaging worked (his evidence being that lieu time was only available for hours worked on average over 50 hours per week), and in particular over what period the averaging was calculated, he stated that the averaging would be carried out over the entirety of Mr Jackson's employment (as opposed, say, to a rolling period of a shorter duration). However, I am bound to say that I found this explanation quite unconvincing. This is because Mr Marr had also said that there was no arrangement in place for the company to pay out TOIL that had not been taken during an employee's employment. What this means, therefore, is that Mr Marr's *averaging* explanation makes no sense practically speaking as, on his explanation, one would only know whether TOIL had accrued at the end of an employee's employment and, if it had, the employee could not then take it and would not be allowed to have it paid out in any event.

[28] When I asked Mr Eyles on 28 June 2013 whether he had heard about the company averaging hours to work out if someone had earned TOIL or not, he said that he did not know anything about averaging, had not heard of that before and that it would not make sense.

[29] In light of these factors, I do not accept Mr Marr's evidence on this issue as it lacked credibility and had the distinct flavour of being an *ex post facto* justification for Mr Jackson not getting his TOIL. As opposed to Mr Marr's evidence, I found Mr Jackson's evidence to be candid, if a little hazy on the details. Mr Whiteside's evidence was both candid and clear although, unfortunately, Mr Whiteside was not present during the conversation between Mr Marr and Mr Jackson.

[30] On balance, given that Mr Jackson's evidence is more credible than Mr Marr's, and that the TOIL arrangement needed certainty to work (or else it would be of nugatory effect) I accept Mr Jackson's evidence that an agreement was reached between Mr Jackson and Mr Marr on behalf of the respondent that Mr Jackson would be entitled to accumulate TOIL on an hour-for-hour basis.

What were the weekly threshold hours worked, above which TOIL would accrue?

[31] Mr Jackson's evidence was that he *assumed* that he would earn TOIL for every hour worked over 40, relying on the 26 July 2010 Addendum. However, his email of 9 May 2010 speaks about receiving some form of recognition for work over 50 hours per week. In his statement of problem, he calculates a dollar value for accumulated TOIL based upon a threshold of 45 per week.

[32] Mr Marr's evidence was that the 40 hours per week referred to in the 26 July 2010 Addendum was a *typo*, and that it should have stated 50 hours per week. Mr Marr denied flatly at the Authority's 8 March 2013 investigation meeting that there had been a preceding addendum and asserted that the 26 July 2010 addendum before the Authority was the only one that had been given to Mr Jackson. This was obviously not true, however, as the 20 December 2010 addendum had also been signed by him.

[33] The fact remains that both the 26 July 2010 and the 20 December 2010 addenda state that the hours of work were *based on 40 hours per week*. Importantly, Mr Marr signed both addenda and did not amend the *typo*, if indeed it was one, on either occasion. Furthermore, the addenda were signed after the email from Mr Jackson dated 9 May 2010 which referred to a 50 hour a week threshold. That email was therefore superseded by the signed 26 July 2010 Addendum.

[34] Therefore, as far as Mr Jackson is concerned, he was perfectly entitled to infer that the base hours per week were 40 and that, therefore, he would be entitled to TOIL for every hour that he worked per week over 40 hours. That is not altered in my view by him setting out a calculation in his statement of problem after his resignation which was based on 45 hours a week.

Was Mr Jackson entitled to be paid for accrued TOIL not taken at the end of his employment?

[35] Mr Jackson's evidence was that he resigned from the employment of the respondent because he found the hours of work too demanding. He asked Mr Marr about being paid for the accumulated TOIL and was told that the company did not pay out TOIL. Because of that, Mr Jackson then refused to work on-call or work above

his rostered 40 hours. Mr Marr said that he reluctantly agreed to this effective work to rule, because he wanted to avoid *a shit fight*.

[36] I believe Mr Marr when he states that the company has never paid off accumulated TOIL. He also says that it was up to each individual to manage their TOIL to ensure that they took it. It was Mr Jackson's evidence, however, that he was never told that he was expected to manage his TOIL and that it was impossible to take the many hours of TOIL that were being accumulated on a monthly basis because he was so busy. Mr Whiteside's evidence supports Mr Jackson's evidence in this regard.

[37] On the face of the evidence, the respondent made a meaningless representation to Mr Jackson. Merely accumulating notional hours of TOIL without being able to take the time off would not have addressed Mr Jackson's specific concern, which he expressed before agreeing to the employment, that the role would entail long hours so that *you end up working for a very low hourly rate*.

[38] In my view, it is necessary for the purposes of business efficacy, or alternatively, by virtue of the employer's duty of good faith, to imply into the employment agreement between the respondent and Mr Jackson a term that the respondent would allow Mr Jackson a reasonable opportunity to take as leave the TOIL that was accumulating from month to month and that, insofar as that was not reasonably possible for him to take that TOIL as leave, for the value of that untaken accumulated TOIL to be paid out at the end of the employee's employment. If the employer had wished to rely upon a term that TOIL would never be paid out, it needed to have expressly agreed a clear and unambiguous term to that effect so that both employer and employee understood the consequences of the arrangement. It is unlikely that Mr Jackson would have agreed to such a term.

[39] Therefore, I find that Mr Jackson is entitled to be paid out in respect of TOIL that had accrued but that he had not been allowed or able to take.

How much in arrears is Mr Jackson due?

[40] Section 131 of the Act provides as follows:

131 Arrears

(1) *Where—*

(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or

*(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—
the whole or any part, as the case may require, of any such wages or other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.
(1A) The Authority may order payment of the wages or other money to the employee by instalments, but only if the financial position of the employer requires it.
(2) Subsection (1) applies despite the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary.
(3) Subsection (1) does not affect any other remedies for the recovery of wages or other money payable by an employer to any employee under an employment agreement or a contract of apprenticeship.*

[41] Section 137 of the Act provides that the Authority may order compliance with any provision of any employment agreement. This includes terms implied into an employment agreement (*Air New Zealand Ltd v Airline Stewards and Hostesses IUOW* [1987] NZILR 605 (LC)). By virtue of either s.131 or 137, the Authority has the power to order the respondent to pay to Mr Jackson a sum equivalent to the value of the accrued but untaken TOIL.

[42] Insofar as the issue of the threshold hours is concerned, for the reasons given above, I rely upon the written 26 July 2010 Addendum which states that Mr Jackson's base hours are 40 per week. The respondent has done a careful analysis of the hours worked by Mr Jackson throughout his employment, and it shows that Mr Jackson worked a total of 751.25 hours over 40 hours. I accept the respondent's evidence and note that Ms Boyce also does so in her submissions.

[43] Calculating that Mr Jackson earned \$31.25 an hour gross, and accepting the respondent's calculation that he worked a total of 751.25 hours above the threshold of 40 hours a week, he is, on the face of it, entitled to a gross sum of \$23,476.56 in respect of accrued but untaken TOIL.

[44] However, it is necessary to take into account the days that Mr Jackson took as TOIL days off, as Mr Jackson would have been paid for these days already, and the respondent should not pay for these days twice. Insofar as TOIL days were taken off Mr Jackson's holiday entitlement at the end of his employment, I deal with those days in the section below. The respondent will have to pay Mr Jackson for those days wrongfully deducted.

[45] I believe that Mr Jackson took eight days off as TOIL days which the respondent wrongfully characterised as annual leave. These days were 26 April 2011, 4 November 2011, 7 to 11 November 2011, 5 February 2012. He will have been paid for those days but will have had eight days wrongfully deducted from his final annual leave entitlement. I shall order the respondent to pay Mr Jackson in respect of those deductions separately, and so eight days TOIL needs to be deducted from the sum due to Mr Jackson under this heading.

[46] It appears that Mr Jackson took other days off as TOIL, which the respondent also recognised as TOIL. These were 1 November 2010, and 21 April 2011. These days were therefore paid for and need to be taken into account in calculating how much is owed by the respondent.

[47] There are also four days (10 to 13 April 2012) which had already been characterised as annual leave by the respondent but which were shown as *training* in the timesheet and which I conclude should have been treated as TOIL days. I deal with this in the section below, and so these days should be deducted from the sums owed under this section. In total 14 days need to be deducted from the TOIL owed to Mr Jackson.

[48] Mr Jackson's daily gross pay rate was \$250 and so the sum of \$3,500 (14 x \$250) is to be deducted from \$23,476.56. This leaves the respondent owing to Mr Jackson the sum of \$19,976.56.

Holiday pay

[49] Sections 24 to 26 of the Holidays Act 2003 provide:

24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen

(1) Subsection (2) applies if—

- (a) the employment of an employee comes to an end; and*
- (b) the employee is entitled to annual holidays; and*
- (c) the employee has not taken annual holidays or has taken only some of them.*

(2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—

- (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or*
- (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.*

25 Calculation of annual holiday pay if employment ends before further entitlement has arisen

(1) Subsection (2) applies if—

- (a) the employment of an employee comes to an end; and
- (b) the employee is not entitled to annual holidays for a second or subsequent 12-month period of employment because the employee has not worked for the whole of the second or subsequent 12 months for the purposes of section 16.

(2) An employer must pay the employee 8% of the employee's gross earnings since the employee last became entitled to the annual holidays, less any amount—

- (a) paid to the employee for annual holidays taken in advance; or
- (b) paid in accordance with section 28.

26 Payments may be cumulative

To avoid doubt,—

- (a) gross earnings for the purposes of section 25(2) includes any payments under section 24(2); and
- (b) an employee may be entitled to payments for annual holidays under both section 24 and section 25.

[50] It is Mr Jackson's original contention that he had 13 days' holiday pay deducted from his accumulated 21 days because the respondent retrospectively treated 13 days which had originally been taken as TOIL as annual leave. The matter was complicated somewhat because the respondent designated TOIL as *training* in its accounting system. Mr Jackson's evidence, corroborated by Mr Whiteside, is that this was so that the accounting system would not show how much TOIL was being accumulated by the staff.

[51] Upon investigation, it appeared that not all of the 13 days that were taken from Mr Jackson's accumulated 21 days' leave had been designated as *training* by the respondent and the Authority therefore directed the parties to go through the records carefully and to agree which days were training days (in other words, TOIL days), and which were taken as annual leave but mistakenly not treated as such in the payroll system.

[52] As a result of this investigation by the parties, the respondent conceded that it had erroneously deducted one day from Mr Jackson's annual holiday entitlement and so paid Mr Jackson the net sum of \$214.50 in respect of that day on 17 May 2013. However, the respondent maintains that the remaining 12 days deducted from Mr Jackson's holiday entitlement and accrual were legitimately deducted.

[53] There is no clear cut way of determining this issue, and the best the Authority can do is to analyse the same data that has been relied upon by the parties. Mr Jackson did not keep independent records of TOIL and annual leave that he took.

26 to 29 October 2010

[54] The first set of deductions relates to the period 26 to 29 October 2010, in respect of which four days were deducted from Mr Jackson's accumulated leave total. The respondent characterised this period as paid annual leave taken in advance. There is a staff leave form completed for this period, but no timesheet. The staff leave form, which was completed in handwriting, records 4 days *without pay*, from the dates 26 October to 1 November. It was signed by *Jonathan*. Given that this leave form records four days holiday, and not TOIL or *training*, and given that there is no timesheet for those days, suggesting that Mr Jackson did not work for the days in question, I accept the evidence of the respondent that, in respect of these four days, Mr Jackson took them as holiday and got paid for them. Accordingly, they were correctly deducted from Mr Jackson's accrued leave total.

26 April 2011

[55] The next day in question was 26 April 2011. The respondent's evidence is that one day's leave was taken, and that on the leave form (which had been changed in its design since October 2010) was stated, next to the title *Days in Lieu to Date, -1*. Ms Palmer took this as meaning that Mr Jackson had taken more time than he was entitled to. This had not been deducted from his annual leave entitlement and so she did so in the final calculation.

[56] However, on the respondent's own figures, by the week commencing 25 April 2011, Mr Jackson had worked around 306 hours over and above the 40 hours a week threshold referred to in the 26 July 2010 Addendum, and had therefore accrued that much TOIL. Even if he had taken some of that TOIL, it can safely be said that he did not take 306 hours of TOIL, and so Ms Palmer's supposition that Mr Jackson had taken too much TOIL was ill founded. This may have been resolved if she had spoken to Mr Jackson before simply deducting the day from his annual leave entitlement.

[57] I conclude that this day was taken as an accrued TOIL day and so was wrongly deducted from Mr Jackson's annual leave entitlement.

4 November 2011

[58] Although Ms Palmer's brief of evidence states that this day was not deducted from Mr Jackson's annual leave entitlement, this was a typographical error and it was in fact deducted. Ms Palmer states in her brief that this day was recorded as *training* on the timesheet and was ambiguous on the leave form. The leave form shows a "1" next to the title *Days in Lieu to Date*. Mr Jackson's evidence is that he never had any time off training, and that *training* was used as a means of recording TOIL. This was corroborated by Mr Whiteside.

[59] It is my conclusion that Mr Jackson took 4 November 2011 off as an accrued TOIL day. This should not have been deducted from Mr Jackson's annual leave entitlements therefore.

7 to 11 November 2011

[60] Ms Palmer states in her evidence that these days were recorded as *training* on the timesheet, and on the leave form has question marks against the 5 days in lieu to date. She therefore deducted these five days from Mr Jackson's leave entitlement. Given that I have already accepted that Mr Jackson was entitled to TOIL days, and that these days were designated as *training* in the respondent's records, I conclude that these days were days taken as accrued TOIL days and so should not have been deducted from Mr Jackson's annual leave entitlement.

3 February 2012

[61] Ms Palmer states in her evidence that this day was recorded as *training* in the timesheet and that the leave form does not specify what it was. For the same reasons above, I conclude that this day was taken as an accrued TOIL day and so should not have been deducted from Mr Jackson's annual leave entitlement.

10 to 13 April 2012

[62] These four days were not deducted at the end of Mr Jackson's employment but had been treated as annual leave at the time they were taken. However, both the leave form and the timesheet suggest these days were actually taken as TOIL days. The leave form states, next to the title *Days in Lieu to Date* the words *4 Days taking*. The

timesheet shows these four days as *training*. Therefore, I conclude that these four days were actually TOIL days and should not have been treated as annual leave.

Holiday pay owed for the period 17 August 2011 to 11 May 2012

[63] Pursuant to sections 25 and 26 of the Holidays Act, Mr Jackson may also be owed pay in respect of the period between the day after his anniversary date (16 August 2011) and his last day of employment (11 May 2012). At a gross daily pay rate of \$250, this would entitle him to 8% of \$54,750, equating to \$4,380. However, of the days analysed above as owing to Mr Jackson, 11 of them fall in the period 17 August 2011 to 11 May 2012. So as to avoid double counting, therefore, I must deduct 11 days' holiday pay (\$2,750) from \$4,380, leaving \$1,630.

[64] Ms Chapman in her submissions states that Mr Jackson was paid the sum of \$1,740 in his final pay as holiday pay. It appears from Mr Jackson's final payslip that this payment was in discharge of what the respondent believes was owed in respect of the eight days' holiday pay which had accrued but was untaken (although that should have amounted to \$2,000). If that is correct, then Mr Jackson was not paid the 8% owed under s.25 of the Holidays Act, and I calculate that he is owed the further sum of \$1,630. My order below takes into account the possibility that Mr Jackson has already been paid for his entitlement under s.25 however.

Conclusion

[65] I find that 8 of the 12 days deducted from Mr Jackson's annual leave entitlements were wrongly deducted, and that a further 4 days TOIL were treated as annual leave incorrectly. Therefore, Mr Jackson is owed in respect of those 12 days, which I calculate to amount to the gross sum of \$3,000. I also calculate that he is owed a further sum of \$1,630 (less any sum already paid under s.25 of the Holidays Act 2003).

Did Mr Jackson suffer an unjustified disadvantage in his employment?

[66] Section 103 (1)(b) of the Act provides:

103 Personal grievance

*(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—*

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[67] Section 103(3) of the Act provides as follows:

In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[68] Ms Chapman for the respondent submits that s. 103(3) precludes any finding by the Authority of a personal grievance in this case in respect of the respondent's failure to allow Mr Jackson to take TOIL and to pay him his holiday pay. She submits that the issues relate to a dispute rather than a personal grievance.

[69] Ms Boyce wrote to the respondent on 28 May 2012 raising a personal grievance on behalf of Mr Jackson. The contents of the letter raise concerns that, with respect, confuse an entitlement to TOIL with an entitlement to overtime. The letter also refers to Mr Jackson being owed 13 days' annual leave (which turns out was correct).

[70] Although Mr Jackson resigned on account of the TOIL issue, he has not claimed unjustified constructive dismissal. His complaint does not derive from any particular unjustified conduct alleged to have been pursued by the respondent. It derives from a disagreement between him and Mr Marr as to the extent of his rights to accrue and take TOIL, and to be paid in lieu of untaken accrued TOIL. I am not of the belief that Mr Marr reached an agreement with Mr Jackson about TOIL which he then deliberately reneged upon. Rather, it is more likely that Mr Marr had a vague conception about how the TOIL arrangement should operate, but which did not work in practice. In order to make it work, I have had to imply terms into that agreement.

[71] Mr Jackson's complaint also derives from his discontent at the way that holiday pay was calculated upon his resignation. Again, I do not believe that the employer has acted in bad faith or unjustifiably in respect of Mr Jackson's rights

under the Holidays Act 2003. I believe that they acted in a way that they considered they were entitled to do (albeit erroneously).

[72] Therefore, I do not believe that either of these complaints amount to a personal grievance. I accept Ms Chapman's submission that Mr Jackson's complaint derives *solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of [a] provision of [the] employment agreement* between the parties. Accordingly, I decline to accept Mr Jackson's unjustified disadvantage complaint.

Did the respondent breach its duty of good faith towards Mr Jackson?

[73] Section 4(1) of the Act provides as follows:

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)—*
- (a) must deal with each other in good faith; and*
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
 - (i) to mislead or deceive each other; or*
 - (ii) that is likely to mislead or deceive each other.*

[74] If Mr Marr had made an agreement with Mr Jackson with respect to his rights to accrue, take as leave and be paid for TOIL, which he then deliberately reneged upon, I would be obliged to find a breach of good faith. However, it is not my finding that Mr Marr did deliberately do so. For the same reasons as I decline to find that there was an unjustified disadvantage in his employment, I also decline to find that the duty of good faith owed by the respondent to Mr Jackson had been breached.

Orders

[75] I order the respondent to pay to Mr Jackson the following:

- a.* The gross sum of \$19,976.56 in respect of accrued but untaken TOIL;
- b.* the gross sum of \$3,000 pursuant to s.24 of the Holidays Act 2003; and
- c.* the gross sum of \$1,630 pursuant to s.25 of the Holidays Act 2003 (less any sum already paid to him under that section).

Costs

[76] Costs are reserved. The parties are to seek to agree how costs are to be dealt with. However, in the absence of a binding agreement between the parties within 28

days of the date of this determination, any party seeking costs may lodge and serve a memorandum seeking a contribution to those costs and any response in opposition must be lodged and served within a further 14 days.

David Appleton

Member of the Employment Relations Authority