

[3] Allied says that, as a result of Mr Dew being re-employed subject to an employment agreement with different terms and conditions with the new client, Mr Dew's statutory entitlements accrued under the first employment agreement were correctly paid to him after that employment agreement terminated. Mr Dew was thereafter subject to the terms and conditions contained in the new employment agreement in respect of statutory entitlements, with these entitlements accruing anew from the effective date of the new employment agreement..

Issues

[4] The issues for determination are:

- a. Was Mr Dew's employment with Allied Security continuous following his commencing work for another client of Allied?
- b. If Mr Dew's employment is deemed to be continuous, what are the obligations on Allied in respect of the minimum statutory entitlements relating to annual and public holidays, sick and bereavement leave and parental leave following Mr Dew's commencing work for another client of Allied?

Background Facts

[5] Allied is a company specialising in the provision of security services to businesses, including site security and static guarding services. Mr Dew commenced employment with Allied in September 2009 as a Security Guard. Mr Dew was employed subject to the terms and conditions contained in an unsigned individual employment agreement.

[6] Mr Dew was assigned by Allied to work at a site in respect of one client at the commencement of his employment. Allied was subsequently awarded a contract with a new client, the WDHB, and in early April 2010 Mr Dew contacted Mr Chris McDowall, the Allied Manager responsible for the WDHB client contract, and

informed him that he had been offered, and had accepted, a position at the WDHB by the WDHB security manager.

[7] Mr McDowall explained to Mr Dew that, while it was normal procedure for Allied to make employment decisions in consultation with the client, if Mr Dew wanted to accept the employment offered with the WDHB, this would entail Mr Dew ending his current employment and entering into a new employment agreement. Mr McDowell explained the reason for this as being that the terms and conditions of the new contract Allied had entered into with the WDHB differed to the terms and conditions Allied had entered into with the client to whom Mr Dew was then assigned.

[8] Mr Dew was offered employment in respect of the WDHB contract by Mr McDowell. Mr Dew signed a new employment agreement containing terms and conditions specific to the WDHB contract on 16 April 2010.

[9] Mr Dew was informed that any accrued leave under the first employment agreement would be paid to him upon the termination of that contract. Mr Dew disputed that this should occur on the basis that he believed his employment with Allied to be continuous; however Mr Dew was paid all accrued leave entitlements under his previous employment agreement with effect from week ending 25 July 2010.

Determination

Was Mr Dew's employment with Allied Security continuous?

[10] Allied provided copies of the two employment agreements.

The first employment agreement

[11] The first employment agreement is not signed but there is no dispute between the parties that this employment agreement applied to Mr Dew's initial period of employment with Allied, commencing September 2009.

[12] The employment agreement has a cover sheet with the name 'Allied Security', the company logo and a heading of "Individual Employment Agreement For Static Security Guards".

[13] The second page states that the employment agreement is between Allied Security "called "the Employer" in this Agreement". There is no name of the employee entered but both parties agree that this was the employment agreement which applied to the first period of Mr Dew's employment.

[14] Clause 1 (b) states:

In order to make the fullest use of staff and equipment and therefore achieve the highest levels of productivity the employer may transfer the employee to any work undertaken by the employer in any of its client locations within the region where the employee is based.

[15] Further clauses deal with leave entitlements:

- Clause 8 is entitled 'Public Holidays' and states "*The Holidays Act 2003 applies*".
- Clause 9 is entitled 'Annual Holidays' and states "*The Holidays Act 2003 applies*".
- Clause 10 is entitled 'Sick Leave' and states "*The Holidays Act 2003 applies*".
- Clause 11 is entitled 'Bereavement Leave' and states "*The Holidays Act 2003 applies*".
- Clause 12 is entitled 'Parental Leave and Employment Protection and states "*Parental leave shall be allowed in accordance with the provisions of the Parental Leave and Employment Protection Act 1987.*"

The second employment agreement

[16] The second employment contract is signed by Mr Dew and dated 16 April 2010. The employment agreement has not been signed by an employer representative

but there is no dispute by Allied that it provided this employment agreement to Mr Dew.

[17] The cover sheet is identical to that on the first employment agreement. The second page states that the employment agreement is between Allied Security “*called “the Employer” in this Agreement*”. Mr Dew’s name and address are entered into the section allocated to the name and address of the employee.

[18] Clause 1 (b), relating to the employer’s right to transfer the employee to work in any of its client locations, is identical to clause 1 (b) in the first employment agreement.

[19] Clauses 8 to 12 inclusive are identical in both contracts.

[20] There is no indication in either employment agreement that the employment was of a fixed term nature.

[21] The payroll records provided which cover the period 4 October 2009 to 1 August 2010 indicate an unbroken period of payments from Allied to Mr Dew, there is no interruption to the payments on or about the weeks preceding Mr Dew’s move onto the new employment agreement to indicate a break in the continuity of his employment.

[22] Allied state that the terms and conditions of employment under the second employment agreement are different to those pertaining under the first employment agreement in respect of remuneration, role and job description, employment location, new training and different uniform and equipment.

[23] These matters do not support a conclusion that Mr Dew’s employment was not continuous. Rather matters such as remuneration and job responsibility changes are regularly the subject of negotiations between employers and employees, resulting in variations to the terms and conditions of the employment agreement, but do not result in a break in the continuity of the employment relationship.

[24] Both the employment agreements provided to Mr Dew referred in clause 1 b) to the employer having the right to transfer the employee to any of its client locations. The payroll records indicate no hiatus in payments, nor is there any evidence of Mr Dew's employment being of a fixed term nature.

[25] I determine that Mr Dew's employment was transferred by Allied to another client location as it was entitled to do pursuant to clause 1 (b) of both employment agreements, and that Mr Dew had continuous service with Allied.

If Mr Dew's employment with Allied is continuous, what is the position as regards Mr Dew's minimum statutory entitlements?

[26] Allied explained that the terms and conditions relating to their contract with their new client, the WDHB, stipulated that sick leave and holiday entitlements were not available until after 6 months employment. Allied stated that the result of Mr Dew being allowed to transfer his leave entitlements would have had a negative effect on the billing arrangements Allied had entered into with the WDHB.

Statute and contractual law

[27] Parties to an employment agreement may negotiate for certain terms and conditions of employment, for example the rate of remuneration or hours of work. However an employment agreement cannot contain terms and conditions which attempt to 'contract out' of statute. Statute law sets out the minimum terms and conditions which must apply in any employment relationship. Employers may offer their employees enhanced terms and conditions over the minimum imposed by statute, but the employer and the employee may not agree to, or 'contract out' of the minimum legislative provisions.

[28] Thus while the contractual arrangements between Allied and the WDHB are matters for those parties, these cannot act to restrict or exclude Mr Dew's statutory entitlements.

[29] I have determined Mr Dew's employment to be continuous with Allied and in this situation set out the implications for Mr Dew's minimum statutory entitlements.

The Holidays Act 2003

[30] The Holidays Act 2003 (“the Act”) applies, as is stated in both the employment agreements supplied to Mr Dew, to public and annual holidays, and to bereavement and sick leave.

Annual Holidays

[31] In accordance with s16 of the Act, an employee who has been continuously employed for a completed period of 12 months employment is entitled to not less than 4 weeks’ paid leave. Section 16 (4) states: “*An employee’s entitlement to annual holidays remains in force until the employee has taken all of the entitlement as paid holidays*”.

[32] There are provisions in the Act under s 28 for annual holiday pay to be paid with the employee’s pay in the case of casual employees or employees who are subject to a fixed term contract. Neither of these circumstances are applicable to Mr Dew’s employment.

[33] For all other employees there are only two circumstances, pursuant to s 27 of the Act, when an employee can be paid accrued annual holiday pay, these being when the annual holidays are actually taken, or upon the termination of employment. Mr Dew’s employment being continuous does not fall under the latter circumstance.

[34] I determine that as Mr Dew’s employment was continuous, Allied was not legally entitled to pay out Mr Dew’s accrued holiday entitlement upon the transfer of his employment from one client location to another.

Public Holidays

[35] In accordance with s 61 of the Act, provided 12 months have passed since the employee’s entitlement to an alternative holiday arose: “*An employee may request the employer to exchange the employee’s entitlement to an alternative holiday for a payment*”. There is no provision in the Act for the employer to make such payment without the employee requesting it.

[36] I determine that unless Mr Dew made a request for payment of his alternative holiday entitlement in accordance with the provisions of the Act, Allied was not legally entitled to make such a payment to Mr Dew upon the transfer of his employment from one client location to another.

Bereavement and Sick Leave

[37] In accordance with s 63 (1) (a) of the Act, an employee is entitled to sick leave and bereavement leave: “*after the employee has completed 6 months’ current continuous employment with the employer*”.

[38] Mr Dew has continuous employment with Allied, consequently I determine that the provisions in respect of sick leave and bereavement leave and any service related accruals thereof, apply to Mr Dew with effect from his original date of employment with Allied.

Parental Leave

[39] In accordance with s 17 of the Parental Leave & Employment Protection Act 1987, an employee:

(c) who, at the expected date of delivery for that child, will have been in the employment of the same employer for at least an average of 10 hours a week over –

- 1. the immediately preceding 12 months; or*
- 2. the immediately preceding 6 months, -*

shall be entitled to [partner’s/paternity leave] in accordance with this Act.

[40] I determine that Mr Dew, having fulfilled the service requirements in the Parental Leave & Employment Protection Act 1987, is entitled to such leave as is applicable under that Act.

Remedies

[41] I order that Allied reinstate Mr Dew’s statutory entitlements to the position they should currently occupy had there been no payments in respect of statutory leave entitlements made to Mr Dew.

[42] In respect of the payments made to Mr Dew relating to the above statutory leave entitlements, I understand that Mr Dew agrees to these amounts being repaid in their entirety to Allied and order that he do so within 7 working days.

[43] I would anticipate that the parties can resolve these issues without further assistance from the Authority. If not, leave is reserved to return to the Authority

[44] Allied Security Limited is ordered to pay the Department of Labour the sum of \$71.56 as reimbursement of the filing fee paid by the Department of Labour.

Eleanor Robinson
Member of the Employment Relations Authority