

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Quentin Long (Applicant)
AND New Zealand Lotteries Commission (Respondent)
REPRESENTATIVES Michael Leggat for the Applicant
Karen Spackman for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 27 June 2006
DATE OF DETERMINATION 7 August 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. This is a claim from the applicant for an annual leave entitlement and a long service leave entitlement where he has disagreed with the way in which the entitlements have been calculated by the New Zealand Lotteries Commission (NZLC).

The facts

2. Quentin Long was employed by the NZLC from 26 April 2000 to 10 July 2005 as a shift worker. He was employed as a senior computer operator. His terms of appointment were set out in a letter of employment offer dated 24 March 2000 providing “3 weeks (15working days)” holidays. Attached to that letter were terms and conditions of employment in the NZLC Terms and Conditions of Employment document. For completeness the relevant parts of the letter are as follows:

“24 March 2000

Dear Quentin

I am pleased to confirm our offer of employment as senior computer operator. You will be reporting to Adrian Todd, computer operations manager.

The terms of your employment are set out in this letter and the attached Terms and Conditions of Appointment. The Commission's handbook, as amended from time to time, is enclosed. You should become familiar with all terms of your employment and the Commission's expectations of you as you will be bound by them.

Set out below are some of the specific terms of your employment.

COMMENCEMENT DATE – *to be advised*

SALARY – *\$34,000 pa base salary, plus shift allowance of 15.265%, paid fortnightly by direct credit into your bank account. Reviewed annually, effective from 1 May each year, with any adjustments being retrospective to 1 April of that year.*

ALLOWANCES - *Mileage allowance when travelling outside normal working hours (to be agreed with the computer operations manager). – meal allowance.*

ANNUAL LEAVE - *Three weeks (15 working days). ...”*

3. In the New Zealand Lotteries Commission's Terms and Conditions of Appointment attached to that letter was provision for **Annual Leave** expressed in “weeks”. The relevant parts of the clauses read as follows:

“6. Annual Leave

6.1 *In addition to statutory holidays, you are entitled to three weeks paid leave in each year increased to four weeks after three years' service or promotion to a managerial position. The year runs from the commencement date of your employment. Leave in anticipation is not granted until employees have been employed for a minimum of six months except with the approval of your manager or supervisor. Leave in anticipation in any one year is limited to the proportion for which you have been employed in that year to 365 days.*

6.2 *You should take annual leave before the next anniversary commencement date. Accumulated unused annual leave should not exceed two years entitlement.*

7. Long Service Leave

7.1 *You are entitled to four weeks of long service leave after you complete five years of continuous service. ...*

8. Special Leave

8.2 *You are entitled to sick leave of up to 10 days per year which year runs from the commencement date of employment. Unused sick leave may be accumulated.*

8.3 *You are entitled to up to five days per year which year runs from the commencement date of employment for domestic leave or bereavement leave or combination of both. Unused leave may not be accumulated. ...*

4. From on or about 16 August 2002 to 10 July 2005 Mr Long was employed as a shift supervisor. His terms for this position can be found in an individual employment agreement dated 16 August 2002 (the second agreement). The relevant provision for annual leave was as follows:

“6. ANNUAL LEAVE

6.1 *You are entitled to four weeks annual leave for each year of service you complete, in accordance with the Holidays Act 1981. ...*

8. SPECIAL LEAVE

8.2 *As a minimum, you are entitled to 10 days special leave on ordinary pay in each successive 12 month period of continuous employment. This special leave may be used when:*

- *You are sick; or*
- *You had to care for a sick spouse or a sick dependant child or a dependant parent of either you or your spouse; or*
- *You suffer a bereavement.*

15. ENTIRE AGREEMENT

15.1 *This agreement, including the attached Position Description and together with:*

- *The NZLC Policies and Procedures Manual as amended at the NZLC’s discretion by management from time to time; and*
- *Terms implied by law;*

comprise your entire employment agreement with the NZLC.

15.2 *Any variation to this agreement or its schedules must be recorded in writing and agreed by both parties.*

5. On 1 May 2003 Warren Salisbury the Chief Financial Officer wrote to Quentin Long in the following terms:

“Dear Quentin

The anniversary of your commencement of your employment with the New Zealand Lotteries Commission three years ago was on 26 April 2003.

In your contract dated 16 September 2002 your annual leave was increased from 15 days to 20 days per annum. You were advised that your Long Service leave would no longer apply and you would be pro rata for the three years service you have completed on your three years anniversary. You are now entitled to 12 days long service leave.”

6. There is common ground between the parties on the leave taken by Mr Long during the period of his employment in the two positions he held and under the first and second agreements i.e. the employment contract and the individual employment agreement respectively.
7. Mr Long says that during the time of his employment at the NZLC he had a concern about the calculation of his entitlement. He worked roster patterns of either four days on, four days off, or five days on, five days off. The roster pattern meant that Mr Long worked a total of four days out of every eight, that is, the equivalent of 3.5 days per week.
8. Mr Long raised his concern regarding the calculation of the annual holidays with NZLC's Chief Technology Officer, Quinton Hall in April and May 2005. A letter from Mr Hall that was produced advised that a review of historical records was required and expected it to be completed by the end of May.
9. The response from NZLC in a letter dated 31 May included a page of calculations that Mr Long says he found difficult to follow, particularly the references to his annual leave actual number of days and equivalent days paid. The calculations showed Mr Long that NZLC had been applying some form of divisor to his leave entitlement based on a work pattern of four days on – four days off.
10. Mr Long resigned his employment with NZLC from 10 July 2005. He received a letter dated 8 July 2005 listing the calculations of his final pay, allowances, long service leave and untaken annual leave.
11. Correspondence was entered into between the parties in regard to the calculation of the leave entitlement.
12. In summary NZLC has calculated Mr Long's entitlement to annual leave on the basis of him working four days on, four days off. In doing so it has used the basis of 182 working days per year to derive Mr Long's entitlement as the equivalent of 10.5 days annual leave when he was employed under the first employment contract and 14 days annual leave per annum when he was employed under the second individual employment agreement when he was entitled to four weeks' annual leave. The NZLC says that Mr Long's entitlement on this basis was a balance of 40.7 days. It does not deny that he is entitled to three and four weeks annual leave respectively but that it needs to take into account a pro rata arrangement to account for his roster arrangement.

13. In reply Mr Long says that he is entitled to the equivalent of “15 days” annual leave for his three weeks annual leave entitlement and “20 days” for his four weeks annual leave entitlement under the respective agreements.
14. Subsequently by way of explanation NZLC has explained its basis of calculating the entitlement by applying 70% of 15 and 20 days entitlement respectively. This has been derived from 182 actual working days per year on the roster as a percentage of a full year – 365 days.
15. The next problem to arise relates to Mr Long’s entitlement for long service leave. The entitlement was expressed as four weeks leave after five years of continuous service. Mr Long understood that similarly to his entitlement to “15 days” annual leave, his entitlement to four weeks long service leave meant “20 working days”. The long service leave ceased to accrue when the individual employment agreement of 2002 came into force. The leave was pro rata for the three years of service to be completed on 26 April 2003 and Mr Long says he took this to mean his entitlement was 12 days i.e. 3/5ths of the 20 days. He relies on this being confirmed in the Chief Financial Officer’s letter of 1 March 2003. The calculation did not include an adjustment for shift work, four days on, four days off. NZLC rely upon this as a discretionary payment when it was paid out upon the termination of Mr Long’s employment.

The applicant’s submissions

16. The applicant says that his calculation for annual leave should be based on 15 working days in regard to his terms and conditions of employment set out in the letter of offer dated 24 March 2000 and the attached Terms and Conditions of Employment (first agreement).
17. Further he says that from 16 September 2002 to 10 July 2005 as a shift supervisory under the terms of an individual employment agreement dated 16 August 2002 he is entitled to four weeks annual leave being 20 days per annum.
18. He relies upon the letter of the respondent’s Chief Financial Officer dated 1 May 2003 that stated the annual leave for this period as 20 days per annum. Mr Long relies upon the terms of the employment agreement where the expression was used for 15 and 20 working days. He also relies on the documentation and NZLC’s own internal records and the conduct of NZLC over a five year employment relationship. This includes an email he produced from a manager in charge in regard to another employee who requested how much annual leave he got per annum in days? The reply was “*You get a whole 20 days!*”

19. It was submitted that Mr Long was entitled to reasonably believe that his entitlement would be 15 and 20 days respectively along with the way in which his long service leave was calculated pro rata at 12 days being $\frac{3}{5}$ ths of 20 days.

The respondent's submissions

20. The respondent relies upon s.17(1) of the Holidays Act 2003 (the Act) to apply an employee's entitlement to a minimum of "three weeks" annual leave to be met by consideration of what "*genuinely constitutes a working week for the employee*" concerned. It also relies upon the definition of "week" under the Holidays Act 1981 that defined a week as "*the workers ordinary working week*". It relies upon the use of the term week rather than days in the legislation. In this regard it summarises that the calculation should be on the basis of 10.5 days of annual leave per annum under the entitlement of the first employment contract and 14 days entitlement under the second individual employment agreement on the basis that Mr Long was a four days on, four days off shift worker. The Authority was also requested to take into account the surrounding factual matrix that involves the following:

- Mr Long's ordinary working week and the legislative minimum entitlements to annual leave at the time was three weeks per annum.
- The legislation expressed the annual leave entitlement as weeks rather than days.
- The entitlement is expressed in the base document (being the Terms and Conditions of Employment) as three weeks.
- The respondent's employees were provided with three weeks annual leave per annum.
- Mr Long's roster pattern and an entitlement to three weeks annual leave is clearly inconsistent with an entitlement of 15 working days of annual leave where three weeks is the equivalent of 10.5 days, whereas 20 working days is the equivalent of 4.28 weeks.
- The reference to 15 days is expressed in brackets and the non bracketed entitlement to three weeks annual leave per annum makes those 15 days subordinate to the main entitlement. The Authority was requested to prefer the main entitlement.
- Mr Long received shift allowance on his base salary in recognition of working shifts. He was not compensated for additional annual leave.

- The respondent says that the bracketed words in the letter were a drafting error caused because of a precedent letter of offer that was used and was inadequately customised to suit Mr Long's particular circumstances. The Authority was requested to ignore what the applicant thought the words meant.

21. It is submitted that Mr Long's statement that he has misconstrued his own employment agreements is simply incorrect where the employment agreements do not contain any express statements in terms of the leave entitlement being 15 working days and 20 working days respectively.
22. The respondent says it has exercised an absolute discretion on paying out the long service leave given the discretionary nature of any payment for untaken long service leave upon the termination of employment. It was submitted by the respondent that the applicant has no basis upon which to contest in any way this payout and how it was calculated when his employment was concluded.

The Issues

23. It was agreed that I determine the principles and leave any question of quantum until later if it is necessary to be determined. Leave is granted accordingly if it is needed for the parties to return to the Authority for any decision on quantum.
24. The first fact to sort out is what Mr Long's leave entitlement was. Secondly, as a matter principle, I have been asked to determine how the calculation for Mr Long's annual leave and his long service leave should be made.

Determination

25. Mr Long's entitlement must be based on what the parties agreed. In this case the NZLC's position was not assisted by the terms that were put in writing, and secondly, that it used an arrangement for calculating leave for Mr Long without any agreement. Indeed the evidence supports Mr Long not even understanding what the NZLC was doing in calculating his leave entitlement.
26. NZLC led Mr Long to believe, without correction during his employment, that he was entitled to 15 and 20 days respectively. He not unreasonably believed that was his entitlement notwithstanding his shift arrangements and the logic of pro rata "leave" arrangements for shift workers. Indeed the Act's reference to leave in *weeks* is consistent with workers who work

more than five days a week and to provide a greater entitlement in terms of days. As such the reference to “weeks” leave in the Act and in Mr Long’s individual employment agreements does not assist his argument.

27. As a matter of fact Mr Long is entitled to leave but under the terms of his individual employment agreements that provide for his leave in “weeks”. Mr Salisbury says he made a mistake with the references to days in the correspondence. However given the human resources capability available to the NZLC it is reasonable to expect an organisation as large, and as resourced as the NZLC is, that it could reasonably get these matters correct. First it should have clarified the entitlement much earlier and ensured that the line managers understood what was involved. Secondly it should have ensured that Mr Long understood the basis of the calculations of any leave.
28. My interpretation of the Act is consistent with NZLC’s approach that would entitle it to make its leave arrangements for shift workers on a pro rata arrangement. My reasons are as follows:
29. The legislation expressed the annual leave entitlement as weeks rather than days and to be met by consideration of what “*genuinely constitutes a working week for the employee*” concerned (s 17(1) of the Holidays Act 2003). Furthermore the calculation of holiday pay is based on ‘ordinary weekly pay’ that means “*the amount of pay that the employee receives under his or her employment agreement for an ordinary working week*”. The NZLC’s approach is consistent with this.
30. The individual employment agreements made provision for the leave in “weeks”. The provisions of the individual employment agreements must apply over the letters that Mr Long relies upon to conclude his entitlement was “15” and “20” days respectively. Indeed Mr Long’s shift arrangements meant that he was able to take uninterrupted leave and it was open to him to plan his leave to ensure it was uninterrupted and even to maximise it at the time it was taken. However NZLC’s calculation of holiday entitlement upon the termination of Mr Long’s employment only had to recognise the amount of leave available in accordance with the terms of employment and the Holidays Act.
31. The letter dated 24 March 2000 referred to three weeks albeit (15 days). The second individual employment agreement comprised Mr Long’s “*entire employment agreement*” (clause 15.1). Therefore the terms are clear and certain to express leave in “weeks” rather than days.

32. There is no entitlement to long service leave at all. I accept that this was a discretionary payment (clause 7.3 of the first agreement).
33. In conclusion Mr Long is not entitled to further leave on the basis that his leave is calculated in weeks as a matter of fact and law. There is no entitlement to long service leave.
34. Costs are reserved.

P R Stapp
Member of Employment Relations Authority