

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 333
5532747

BETWEEN

JOHN LYALL

Applicant

AND

VEXLING LIMITED

Respondent

Member of Authority: Robin Arthur

Representatives: Amanda Kennedy, Counsel for the Applicant
David James, Counsel for the Respondent

Investigation Meeting: 20 October 2015

Determination: 22 October 2015

DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Vexling Limited must pay John Lyall the sums of:**
- (i) \$18,360 for 68 days of annual leave due but not taken by the end of his employment on 12 October 2014; and**
 - (ii) \$3,744 as holiday pay for his last eight months of employment.**
- B. Vexling Limited must also pay Mr Lyall interest on those sums at the rate of five per cent calculated from the date of his last day of employment until the date of payment.**
- C. Costs are reserved with, if determination of costs is necessary, memoranda to be lodged on a timetable set in this determination.**

Employment Relationship Problem

[1] From February 1999 until October 2014 John Lyall worked for a travel agency business in Kerikeri owned by Vexling Limited (Vexling). The business had traded as Trixie Newton World Travel and in recent years as Trixie's United Travel. Mr Lyall was manager of the business from 2000. He had no written employment agreement.

[2] Mr Lyall became a director of Vexling in 2006 and a registered shareholder of ten per cent of its shares in 2007. Vexling's other director, and the beneficial owner of the other 90 per cent of the shares was Patricia Brown. Ms Brown, previously known as Trixie Newton, had opened the travel agency in 1976.

[3] In late 2013 Ms Brown and Mr Lyall had talked about the prospect that she would sell her interests in the business and he would purchase them. During a meeting in January 2014 to discuss that prospect Mr Lyall proposed using the value of his accumulated holiday pay entitlements, of around \$30,000, as part of the purchase price. Ms Brown was said to have been surprised by news that Mr Lyall had such an accrued entitlement. She did not agree to Mr Lyall's proposal. Instead by early October 2014 the travel agency business was sold in an asset sale to a third party. The business has continued in operation under its new owners. Ms Brown and Mr Lyall remained as shareholders and directors of Vexling.

[4] Mr Lyall's employment ended as a result of the sale of the business but a dispute endured between him and Ms Brown over whether Vexling still owed him holiday pay and if so how much. Mr Lyall's account was that he had accrued entitlements during his employment to 254 days of leave, had taken 145 of those days and had an outstanding entitlement to pay for 109 days of leave not used before his employment ended. Mr Lyall's tally for the value of those days was \$36,184.18. Vexling's calculation – if any holiday pay was found to be owed – relied on its accountants' assessment, made using company records, which had concluded Mr Lyall's accumulated holiday pay entitlement was \$16,339.84. Points of difference between the two tallies arose from the number of years through which accumulated days were counted and whether Mr Lyall had a contractual entitlement to 25 days a

year rather than the statutory minimum of 20 days due under the Holiday Act 2003 from 2008.

[5] It was these holiday pay issues that the Authority has investigated and determined. There are other issues between Mr Lyall and Ms Brown in their capacities as directors and shareholders of Vexling but those matters were not within the Authority's jurisdiction to resolve. Simply put the contest between the parties in the Authority was really about whether Mr Lyall's holiday pay claim had any call on the settlement sum Vexling received for sale of the business (among whatever other legitimate calls there might be on that sum).

Issues

[6] The issues or particular questions for resolution, as they emerged during the Authority's investigation, were:

- (i) How far back did the accumulation of days go?
- (ii) Did Mr Lyall's leave entitlement increase from 20 days to 25 days a year from 2008 as a result of an oral agreement with Ms Brown?
- (iii) Should any other days be deducted from Mr Lyall's account of his remaining entitlement?
- (iv) Should Mr Lyall be denied some or all of his accumulated entitlement because he failed to arrange to take leave during those years?
- (v) Was Mr Lyall's entitlement limited to the statutory minimum or should any order include any contractual entitlement above that minimum?
- (vi) What was the correct daily rate for calculation of any holiday pay entitlement found due to Mr Lyall?
- (vii) Should any interest be awarded on any amount found remaining due (and, if so, for what period)?
- (viii) Should either party contribute to the reasonably incurred costs of the other party?

Investigation

[7] For the purposes of its investigation the Authority received written and oral evidence given under affirmation or oath from Mr Lyall, Ms Brown, Vexling's accountant Annika Dickey, and two former employees who have continued to work in

the business under its new owners: Sabine Ebrecht and Tracey Anderson. The witnesses answered questions from me and the parties' representatives. The representatives also provided oral closing submissions on the facts and the issues, which I have taken into account.

[8] As permitted under s174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has stated findings of fact and law and expressed conclusions on the issues requiring determination to dispose of the matter.

(i) The period of accumulation

[9] Mr Lyall's account of his residual leave entitlements included 10 days accrued prior to February 2005, three days of his annual entitlement to February 2005 and four days of his annual entitlement to February 2006. It differed from the analysis prepared by Ms Dickey. She had relied on payroll and other records she had arranged to be collected from the travel agency office. Ms Dickey had excluded the leave days recorded on the company's computerised payroll system as accrued by Mr Lyall before 2007 because she said that record did not include a breakdown of what those days were made up of and she could not substantiate them.

[10] Mr Lyall's evidence was that the business implemented a computerised payroll system in 2004 which recorded the 17 unused leave days accrued by February 2006. Those 17 days were included in his tally of 109 days recorded in the payroll records as "annual leave not taken" by the date his employment ended on 12 October 2014. He also said there were other records available at the agency's office from which Ms Dickey could have substantiated those leave days were due to him. There was, I concluded, no real reason to doubt those particular 17 days were genuinely accrued and due to Mr Lyall in those years of his employment. They remained part of the claimed entitlement considered in this determination.

[11] Neither did any limitation period apply to the entitlement Mr Lyall claimed. Accumulated holiday and annual leave do not expire during the term of employment.

Statutory limitation periods for claiming accumulated leave owed on termination of employment run from the date the employment ends.¹

(ii) Was Mr Lyall’s annual leave entitlement five weeks a year from 2008?

[12] Mr Lyall’s evidence was that his terms of employment, agreed orally with Ms Brown, provided for four weeks of annual leave after he was appointed as a director of Vexling in 2006, one week more than the statutory minimum at the time. He also said that when the Holidays Act was amended to provide a statutory minimum of four weeks a year, Ms Brown agreed to a request from him to increase his annual leave to five weeks, maintaining the margin of an extra week.

[13] Ms Brown’s written witness statement had not rebutted or even commented on Mr Lyall’s account about those terms in his written witness statement. Her oral evidence did. She confirmed she had agreed to the increase from three to four weeks in 2006 but said Mr Lyall’s request for an increase to five weeks (after the Holidays Act was amended in 2007) had resulted in “a discussion” and no outcome “set in concrete”. Asked directly whether she had agreed or not, Ms Brown replied: “Probably in discussion it would be taken that way” but that she could not answer – as to whether she had at the time agreed to the request – yes or no. She did not accept that she knew Mr Lyall had, at the time, taken her to agree. She said: “No. It was left in limbo”.

[14] Mr Lyall’s evidence was that he asked Ms Brown “if it would be right I’d move to five weeks” (after the Holidays Act amendment) in order to maintain his extra week’s leave and she had agreed. He conceded the agreement was verbal only.

[15] A difficult evidential assessment was required. The standard was the balance of probabilities, considering what was more likely than not to have happened. There was no contemporaneous documentary evidence that might have assisted, apart from what Mr Lyall said was the change to payroll records he made from that time so the accumulation of his leave was on the basis of an annual five week entitlement rather than four. It was an action that did nothing more than confirm that was what he

¹ *Vince Roberts Electrical Limited v Carroll* [2015] NZEmpC 112 at [26]

believed at the time was agreed, rather than an objective standard. Ms Brown's denial of any agreement was similarly subjective.

[16] Requirements for employers to provide a written employment agreement operated throughout this period. Mr Lyall's evidence was that neither he nor Ms Anderson and Ms Ebrecht had written employment agreements. If the claim about leave above the statutory minimum was one advanced by Ms Anderson or Ms Ebrecht rather than Mr Lyall, the benefit of the doubt caused by that failure would more likely be construed in their favour.² Mr Lyall's situation was however somewhat different. He was the manager of the business, sat in with Ms Brown when she was interviewing and deciding on appointments of any new employees, and was a director and a shareholder of the business. He was expressly charged with dealing with day-to-day management of the business (as he confirmed in his evidence) and dealt with all payroll matters. The payroll records also confirmed that the business was suitably attentive to legal obligations concerning PAYE, Kiwisaver contributions and keeping proper wage and holiday records. In that context Vexling's directors (both Ms Brown and Mr Lyall) should also have attended to the obligation to provide written employment agreements both for him and the other employees. Having failed to do so, and also having failed to have kept a record in writing of the alleged variation to Mr Lyall's employment terms to grant five weeks' annual leave, the question was whether the benefit of the doubt caused should favour Mr Lyall or Vexling.

[17] On balance the evidence did not support a conclusion that Ms Brown had positively accepted an obligation on Vexling's behalf to provide Mr Lyall with five week's leave above the statutory minimum after 2007. Subsequent calculations of Mr Lyall's leave entitlements in this determination have been made on the basis of four weeks' annual leave from 2006 onwards, with the effect that his tally of days owed was reduced from 109 to 69 days.

(iii) Should any other days be deducted from Mr Lyall's tally?

[18] Within the general dispute there was also a specific issue about whether Mr Lyall was absent from work on seven particular days in 2013 and, if so, whether those days should have been recorded as annual leave.

² Employment Relations Act 2000, s 3(a)(ii), s 64 and s 65.

[19] Mr Lyall could not recall whether he was at work or on sick leave on 2 April, 29 May and 2 July but had not taken those days as annual leave. The days were probably times when he was absent for medical appointments related to a shoulder injury. The evidence from Mr Lyall and Vexling did not support a conclusion that those days were annual leave taken and should be deducted from his tally of leave days owed.

[20] He averred that, to the best of his knowledge, he was present at work on 23, 24 and 25 September (and not on annual leave). I did not accept the evidence of Ms Brown and Ms Dickey that an apparent gap in the records was sufficient to exclude those days as having already been taken and paid for as annual leave days.

[21] The same did not apply to another unaccounted for day, 5 September 2013. Mr Lyall's evidence confirmed that he was due to be on holiday that day but chose to attend work. For reasons given later in this determination, relying on case law, it was not a day he was now entitled to claim as leave owing.³

[22] The result, in the respect of those seven days, was that one day still claimed as leave had to be deducted from Mr Lyall's tally, leaving a total of 68 days.

(iv) Should Mr Lyall forfeit leave entitlements for failing to arrange to take it?

[23] The heart of Vexling's defence to Mr Lyall's claim, and of Ms Brown's evidence about it, was her view that as a senior manager and director of the company Mr Lyall should have arranged to take and use up all his leave. As Ms Brown put it in her written witness statement, "it was not the company's fault that Mr Lyall did not take his holidays" as "he operated the business and managed his own employment contract" and she "could not understand why the company should have a debt to him when he was the manager".

[24] While Ms Brown's view was understandable I have concluded the necessary answer must be different because of the requirements of the Holidays Act 2003, what decisions of the Employment Court have said about entitlements to holiday pay in

³ See para [32] below and *Roche v Urgent Medical Services Home Care Limited* [1999] 2 ERNZ 788.

similar situations, and the specific circumstances in which Mr Lyall came to end his employment with leave still owing (including Ms Brown's knowledge that he was not using all his leave).

[25] The Holidays Act 2003 includes a stated purpose of requiring employers to pay employees at the end of their employment for annual holidays not taken or paid out.⁴ Annual holidays are defined as the entitlement provided by the Holidays Act, which are presently "not less than 4 weeks" after the end of each completed 12 months of continuous employment.⁵

[26] The Holidays Act has certain requirements about when an employee must be allowed to take leave – that is within 12 months of the entitlement to it arising and for at least two weeks continuously if the employee wants to do so. There is no requirement for an employee to ask for and agree to use all their leave entitlement in that period. When holidays are to be taken is a matter for agreement between the employer and the employee.⁶ The legislation does enable an employer to manage the accumulation of leave entitlements and to have leave taken at convenient times for its business operation by allowing an employer to require an employee, on notice, to take annual holidays if agreement cannot be reached.⁷

[27] The Employment Court has described the statutory minimum holiday entitlements as "sacrosanct" with an expectation that employers will be aware of those obligations:⁸

Persons employing employees are therefore expected, and deemed, to know of these minimum requirements and to comply with them. Such reasons for non-compliance as ignorance of the law, commercial imperative, difficulty or even inability to pay or similar excuses, are unavailable to employers to avoid liability.

[28] The Court has also specifically considered the situation, as here, where a senior manager claims payment for outstanding leave entitlements that the employing company has – in defending the claim – argued such a manager should forfeit because he (or she) failed to arrange to take the leave during their employment.

⁴ Holidays Act 2003, s 15(c).

⁵ Holidays Act 2003, s 16(1) and s 5(1) definition of "annual holiday".

⁶ Holidays Act 2003, s 18(3).

⁷ Holidays Act 2003, s 19.

⁸ *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [30]-[33].

[29] In *Napier Aero Club v Tayler* the judge reached this conclusion:⁹

... I am unable to accept as a general proposition that, because an employee is in a position of authority, he or she can be deprived of statutory entitlements. Even senior employees are subservient to their boards of directors or management committees who are obliged to take an interest in what is going on so far as the company's or the club's compliance with the law is concerned. This has been clarified in relation to company directors and, perhaps, the law relating to incorporated societies and similar bodies needs to be made more pointed but that does not alter the fact that it is not open to the committee to shift its own responsibilities to the shoulders of its senior employees for the purpose of depriving those employees of benefits to which they are, by law, entitled. ...

Finally, however undesirable stale claims in respect of untaken holidays may seem, there is no room for applying equity and good conscience to defeat them.
...

[30] A different conclusion reached by the Court in an earlier case, *Marine Helicopters Limited v Stevenson*, had no application to Mr Lyall's situation.¹⁰ In that case a senior manager was allowed to take certain days as holidays but had unilaterally decided to work on those days "without reference to the employer and contrary to the grant or allowance which the employer had made".¹¹

[31] The evidence of Ms Brown, Ms Anderson and Ms Ebrecht was that all three women had, at various times, encouraged Mr Lyall to use more of his leave but he was reluctant to do so. Mr Lyall accepted he was encouraged to do so but not as often as the "six times a year" that Ms Brown said she asked him. Ms Brown's evidence did, however, confirm she was aware over several years that Mr Lyall had more leave than he in fact used. While her day-to-day involvement in the business reduced after 2006 she attended the regular weekly staff meetings at the agency's office and knew who was on leave, and when, because she frequently helped 'fill in' for whoever was away. What she did not do – apart from on one occasion in August 2014, some eight or so months after she became aware of the value of Mr Lyall's alleged leave balance – was to positively direct him to take leave. Although she was the majority shareholder and a director, Ms Brown left Mr Lyall to manage his own leave. In those circumstances Mr Lyall cannot be said to have acted in the "contrary" manner described by the Court in *Stevenson*. As the dicta cited from the *Napier Aero Club* case confirmed, Vexling was not relieved of its obligations to Mr Lyall as an

⁹ [1998] 1 ERNZ 241 at 247.

¹⁰ [1996] 1 ERNZ 472.

¹¹ *Stevenson*, above, at 496.

employee by what, in hindsight and fairly viewed, appear to have been failures of both Mr Lyall and Ms Brown to avoid his leave liability accumulating to such a high value.

[32] The situation with Mr Lyall was also substantively different from the case of *Roche v Urgent Medical Services Home Care Limited* where a medical director of an after-hours emergency medical centre (who was also managing director of the company that employed him) had arranged holidays but then attended work to carry out ‘hand overs’ to his temporary replacement on the first and last day of his leave.¹² In those circumstances the employing company was not found to have breached the employment agreement or the Holidays Act. However there was one day identified – 5 September 2013 – where Mr Lyall had worked, by his own choice, on an arranged leave day and it has been excluded (see paragraph [21] above) from the tally of his leave entitlement.

[33] In closing submissions Vexling suggested Mr Lyall had breached the good faith obligations expressly required by s 73 of the Holidays Act. Its strongly worded submission suggested Mr Lyall had purposely “banked up” his holidays and kept his entitlements quiet. I did not accept that submission. The evidence did not support a conclusion that he was – to use the definition of good faith given at s 4 of the Employment Relations Act – misleading or deceptive about his leave or its use. Ms Brown’s own evidence was that she was aware on a weekly basis of who was using leave and when. She knew Mr Lyall had not used all his entitlements because she encouraged him to take more leave. While she may not have turned her mind to the potential dollar value of his unused entitlement, and was surprised to hear in January 2014 how high it was, the tally was not the consequence of secretive or deceptive behaviour.

[34] The evidence of Ms Brown and Ms Dickey included criticisms of Mr Lyall’s work as a manager of the business and decisions in which he was involved as a director and shareholder of the company. One example given by Ms Dickey concerned whether he should have agreed to take a salary cut when the business generated losses in 2010 and 2011. Another concerned whether he should have put more personal funds into the company. Such matters could have been pursued with

¹² [1999] 2 ERNZ 788.

him as a director and shareholder or, when he was still employed, as matters of performance as an employee. However none of those concerns negated Vexling's statutory obligation to pay for leave entitlements accumulated by the end of his employment.

(v) Do different rules apply to the extra leave granted above the statutory minimum?

[35] The earlier conclusion that Mr Lyall had not sufficiently established that five weeks leave from 2008 was an agreed term of employment had the effect of removing 40 days from his claimed tally. There were however some days remaining in his claim generated from the time between 2006 and 2008 when he had an agreed four weeks' entitlement that was superior to the statutory minimum in those years. While his rights in respect of those 'contractual' days has a different source to the days protected as statutory minimum entitlements, the overriding principle was that an employee was entitled to be paid for leave not taken by the time that the employment ended. The obligation is expressly stated in the statute but there was no reason that a breach of a term of employment (whether recorded in writing or made only orally) was any more acceptable than a breach of the Holidays Act.

(vi) What daily rate applies to any entitlement?

[36] Mr Lyall's final pay slip showed \$270 as being the daily rate at which annual leave days not taken should be paid. A timesheet history generated from the computerised payroll system showed \$270 was the daily rate applied to the 89 days of leave he was recorded as having taken since mid-2008. However Mr Lyall's calculation of his outstanding entitlement used a lower rate of \$246.59 for days of leave left unused in the years before then (including 2005, 2006 and 2007). It was not correct.

[37] Section 24 of the Holidays Act states the rate of pay for the leave must be the greater of the employee's rate of pay at the day of the end of the employment or immediately before the end of the last pay period. Accordingly the appropriate rate was \$270 a day, not a lower rate for some years based on Mr Lyall's salary in those earlier years.

[38] Taking that rate and applying it to the 68 days accepted as accrued leave entitlements for which Mr Lyall should have been paid at the end of his employment, the amount due to him from Vexling was \$18,360.

[39] To that amount had to be added holiday pay due for his last part year of employment in 2014. Mr Lyall had incorrectly calculated it on the basis of eight per cent of his full annual salary of \$70,200. The proper period, as confirmed during the investigation meeting, was eight months (from 10 February to 12 October). Taking his monthly salary for those eight months and applying the eight per cent holiday pay entitlement gave a result of \$3744.

[40] The total due for annual leave and holiday pay was \$22,104.

(vii) Interest

[41] Where an employee's employment has come to an end, the Holidays Act requires the employer to pay any annual holiday entitlements in the employee's final pay.¹³ Mr Lyall's entitlement to payment for leave not taken before his employment ended crystallised at the date of termination.¹⁴

[42] In this case the appropriate date to use was 12 October 2014, the last day of his final pay period (and does not include two days of 13 and 14 October that he spent with the owners of the new business doing a handover, at no cost to them or Vexling). Mr Lyall was denied use of the monetary value of his leave entitlements from that date so Vexling, by order of the Authority under clause 11 of Schedule 2 of the Employment Relations Act 2000, must pay him interest on the amount due from then until the date of payment. The rate of interest is five per cent.¹⁵

(viii) Costs

[43] The parties are encouraged to resolve any matter of costs between them. If they were unable to do so and Mr Lyall sought an Authority determination of costs,

¹³ Holidays Act 2003, s 27(2).

¹⁴ *Vince Roberts Electrical Limited v Carroll* [2015] NZEmpC 112 at [27].

¹⁵ Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177).

the matter would likely be resolved on the basis of the usual notional daily tariff, subject to any adjustment upward or downwards necessary for the particular circumstances or factors of the case.¹⁶ Costs would only be awarded in relation to representation on matters within jurisdiction, not any other matters that may be in dispute between the parties.

[44] If an Authority determination of costs is to be sought, Mr Lyall must lodge and serve a memorandum by no later than 28 days after the date of this determination. Vexling would then have 14 days from the date of service to lodge a reply memorandum. Unless prior leave to do so is sought and granted costs will not be considered outside this timetable.

Robin Arthur
Member of the Employment Relations Authority

¹⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].