

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 81
3042211

BETWEEN WILLIAM McLANACHAN
Applicant

AND G.V. SHUTER LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Graeme Shuter for the Respondent

Investigation Meeting: 14 February 2019 in Rotorua

Submissions received: At the investigation meeting

Date of determination: 15 February 2019

DETERMINATION OF THE AUTHORITY

- A. G.V. Shuter Limited is ordered to pay William McLanachan the following sums within 21 days of the date of this determination:**
- (a) \$8,000.00 gross as holiday pay; and**
 - (b) \$71.56 being the Authority's filing fee.**

Employment relationship problem

[1] William McLanachan worked for Graeme Shuter's businesses, including G.V. Shuter Limited (G V Shuter Ltd or the company) trading as Mid City Motors, for a total of about 20 years. His most recent period of work was as a mechanic at Mid City Motors, starting in about early 2006. He resigned in May 2018.

[2] Mr McLanachan says that the company owes him holiday pay as an insufficient amount was paid when he finished his employment. G V Shuter Ltd says that Mr McLanachan's holiday entitlement had been reduced by time he had taken off work to pick up his daughter after school, and that it had paid him all that remained.

[3] An investigation meeting was held in Rotorua on 14 February 2019 and I heard in person from Mr McLanachan, Mr Shuter and from the company's accountant. Mr McLanachan's sole workmate from Mid City Motors gave evidence by telephone.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[5] The issues for determination are whether G V Shuter Ltd owes Mr McLanachan any holiday pay and, if so, how much?

The employment agreement

[6] G V Shuter Ltd's accountancy firm held an unsigned employment agreement between the company and Mr McLanachan from 2007. Mr McLanachan denied having ever seen that agreement. Mr Shuter thought that there would have been an agreement but was unable to recall whether it was this one. No other agreement was produced. I cannot be satisfied that the employment agreement was ever agreed to by Mr McLanachan.

The working arrangements

[7] Mr McLanachan worked 8am to 5pm, Monday to Friday. He says that he and the other employee did not really have an hourly rate, rather they were just paid a set sum each week in cash. Mr Shuter says that there was an hourly rate, rather than a salary arrangement.

[8] There was no recording of the hours actually worked. Mr McLanachan and Mr Shuter agree that occasional time off was taken without any deduction of pay, for example, if a staff member needed to visit someone.

The records

[9] Mr McLanachan says that he had been requesting to see his wage records since early 2017 to determine whether there were holidays owing but no records were provided. He says that Mr Shuter told him that he had not kept the records from previous years. The other employee had difficulty finding out his holiday entitlement when he asked. Mr Shuter says that he did not throw out records but acknowledged some difficulties with locating records.

[10] No payslips were provided during Mr McLanachan's employment and there were no separate holiday and leave records or leave application forms.

[11] It was apparent that limited paperwork regarding employment matters was held or retrievable by the company and some records were missing. The company kept a wage book, sometimes referred to as the PAYE book. As staff were paid in cash, the wage book periodically went to the accountants for the compilation of tax returns and financial statements, although it was usually returned to Mr Shuter afterwards. Copies of some records were retrieved from the accountants and some from the Inland Revenue Department.

[12] The wage book records for the period from 5 March 2007 to 31 March 2014 were retrieved. The current wage book, which covers from 3 April 2017 until Mr McLanachan's resignation, was also available. This leaves a period of three years from 2014 to 2017 for which records cannot be found.

[13] The wage book includes notations of holidays taken, although these generally record the total taken in a pay week such as one day, without noting which days.

[14] The records from 2007 to 2014 show Mr McLanachan taking on average around 70% of his annual holiday entitlement of four weeks each year. The 2017 to 2018 records show him taking a little more than one year's entitlement. Mr McLanachan accepted that the records were correct regarding the holidays he had taken.

Mr McLanachan's arrangement to pick up his daughter

[15] Mr McLanachan approached Mr Shuter about having regular time off work from 3pm to 5pm one day a week to pick up his daughter after school, as his wife had an extra work commitment. Neither party was able to be very precise about when this discussion occurred. Mr McLanachan thought it was about three years before he resigned. Mr Shuter thought it was four years, but accepted it could have been three.

[16] Mr McLanachan says that he asked Mr Shuter whether Mr Shuter wanted him to make up the time by working through his lunch hour or to dock his wages by two hours. Mr Shuter said not to worry and to leave things as they were.

[17] By contrast, Mr Shuter says that Mr McLanachan asked if he could take the pick-up time off 'in lieu' of his holidays so that he would not suffer any decrease in his standard weekly pay. Mr Shuter replied that that would not be a problem and the holidays available would be deducted in accordance with the reduced weekly hours.

[18] There was no recording of the arrangement itself, nor were any holiday hours recorded in the wage book for the pick-up afternoons. Mr McLanachan continued to be paid the same weekly amount. The arrangement was operated flexibly with Mr McLanachan not taking the hours off if it was the school holidays, if his workmate was on leave or off work for another reason, or if they were busy.

[19] I accept Mr McLanachan's evidence that if he had known, via seeing it in the wage book, that he was using up his annual holiday entitlement he would have made other arrangements.

[20] I prefer Mr McLanachan's evidence that the parties did not agree that he would take annual leave for the pick-up hours. This is in keeping with evidence from both parties that the 'give and take' culture of the workplace was that occasional time off was allowed and at other times extra hours would occasionally be worked, all for the same standard weekly rate. I also find it unlikely that there were years of what Mr

Shuter understood to be holidays not recorded, when other holidays, even single or half days, were noted in the wage book.

The annual leave entitlement discussion

[21] Mr McLanachan says starting from early 2017, he raised the issue of how much outstanding leave he had, as he did not think he was using all his entitlement. After Mr McLanachan had difficulties getting a figure or seeing the wage books, Mr Shuter suggested to Mr McLanachan that he try to work it out. Mr McLanachan came up with an estimation of 12 weeks. He says that Mr Shuter agreed to that figure.

[22] Mr McLanachan's workmate says that he heard many discussions in 2017 between Mr Shuter and Mr McLanachan about pay records and holiday entitlements. The workmate heard Mr Shuter agree to 12 weeks' holidays but he could not be precise about when that occurred.

[23] Mr Shuter does not accept that there was discussion of this nature in 2017. He says that a discussion about leave balances was held after Mr McLanachan announced his resignation in May 2018. Mr Shuter explained that from the 12 weeks' leave available at the date of resignation, eight weeks needed to be deducted for the pick-up hours. He calculated that at a rate of eight hours (or one day) a month, a total of ten days (or two weeks), a year were taken. Over four years this amounted to eight weeks of annual leave.

[24] I prefer Mr McLanachan's evidence regarding when these discussion occurred. It was consistent with the workmate's evidence.

Annual leave taken

[25] Mr Shuter maintained that Mr McLanachan had taken his full annual leave entitlement each year. This view appeared to be based on Mr McLanachan taking a holiday each summer, as well as Mr Shuter's sense that if Mr McLanachan had holidays owing, he would have taken them.

[26] I did not find that evidence very persuasive. The summer holidays taken were not lengthy on the available records, certainly not so as to utilise most of Mr McLanachan's four week annual entitlement. Also, it is clear from the earlier records

that Mr McLanachan was accumulating on average about 30% of his holidays each year, over about seven years.

[27] Mr Shuter also argued that he would have insisted that Mr McLanachan had taken his holidays had he had any outstanding. However, there was no recording of a figure of the amount of holidays Mr McLanachan had outstanding, only of when and how many days were taken. Mr Shuter appeared to be relying on his sense of what Mr McLanachan was taking rather than making any calculations. Also, the wage book records commence from the time when the statutory minimum leave entitlement increased from three to four weeks a year, which may have added some confusion. Mr McLanachan continued to take around the three week figure each year.

Amount of holiday pay claimed

[28] Mr McLanachan claims eight weeks' holiday pay. This is based on an entitlement to the 12 week figure agreed along with five weeks accumulated in 2017 to 2018. From that is deducted one week's leave that was cashed up, the leave taken in 2017 to 2018 and the three weeks' holiday pay received on resignation.

[29] It is impossible on the basis of the records provided by the company to establish exactly the quantum of Mr McLanachan's entitlement to annual leave at the **end** of his employment. It is possible to calculate the leave taken in two periods but not in the years in between. Even if I accepted Mr Shuter's evidence about annual leave for school pick-ups, which I do not, I still could not have calculated how many days this occurred on, as there was no recording of them.

[30] Section 83 of the Holidays Act 2003 allows me, where the employer has not complied with s 81 and 82 of that Act, to keep and provide holiday and leave records, to accept the employee's statements about holiday pay and leave taken.

[31] The records kept by G V Shuter Ltd do not comply with s 81 in several regards, including not stating what the employee's current entitlement to annual holidays is. In addition there is the period for which no records were able to be located.

Conclusion

[32] I accept that Mr McLanachan was not paid eight weeks' holiday pay entitlement on leaving the company. His weekly wage on resignation was \$1,000 gross. I order G V Shuter Ltd to pay Mr McLanachan the sum of \$8,000.00 gross as holiday pay within 21 days of the date of this determination.

Costs

[33] Mr McLanachan represented himself and thus is not able to claim reimbursement for costs incurred in representation. However, he did pay the Authority's filing fee. I order G V Shuter Ltd to pay Mr McLanachan the sum of \$71.56 for the filing fee within 21 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority