

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 228
5383491

BETWEEN GRANT McLEOD
Applicant
AND TE APITI TRUST
Respondent

Member of Authority: James Crichton
Representatives: Applicant in person
No appearance for Respondent
Investigation Meeting: 12 April 2013 at Auckland
Date of Determination: 6 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McLeod) alleges that he is owed wages from his employment with the respondent Trust (the Trust) under a variety of heads. At the time of filing the statement of problem, holiday pay was one of the elements outstanding, but it is accepted that holiday pay has now been paid.

[2] Mr McLeod maintains, however, that the Trust has not correctly calculated the relevant daily pay and so payments to him for public holiday leave, for sick pay and for payment for alternative holidays for work on a public holiday are all incorrectly calculated.

[3] In addition, payment of the sleepover back-pay allowance is sought in reliance *inter alia* on a promise made by the Trust to make that payment by October 2012. Finally, Mr McLeod seeks costs.

[4] The Trust resists all of Mr McLeod's claims.

[5] Mr McLeod was employed by the Trust as a residential caregiver in terms of a succession of individual employment agreements, the most recent of which has been provided to the Authority. Mr McLeod's evidence is that while he has had a succession of written employment agreements, his various requests to be provided with copies of those executed employment agreements have been ignored. For the avoidance of doubt, it is accepted by Mr McLeod that a copy of his final employment agreement has now been made available both to him and to the Authority.

[6] Mr McLeod commenced his role in 16 November 2003 and continued in it until 16 May 2012 when he resigned his employment. Shortly thereafter, Mr McLeod issued proceedings in the Authority claiming wage and time records for the last six years of the employment, a copy of the individual employment agreement, compliance with the Holidays Act 2003, compliance with the Wages Protection Act and compensation for breach, and reimbursement of legal costs. The present claim deals with the residual disputes: average daily pay, sleepover allowance, and costs.

[7] Whatever the position was as between the parties prior to the involvement of the Authority, the Authority observes that the statement in reply attached the most recent employment agreement relating to Mr McLeod's employment and an apparently complete set of the wage and time records for Mr McLeod's total employment with the Trust.

[8] It is that information which Mr McLeod has used to carefully prepare his claim before the Authority and the dossier provided speaks volumes of the care that has been devoted to this exercise by Mr McLeod and particularly by his wife, Mrs Sharyn McLeod.

[9] When the Authority convened its investigation meeting, the Trust was not in attendance. The Authority was satisfied that the absence was deliberate rather than inadvertent; the Trust had been represented by able counsel until just before the telephone conference and, the Authority is satisfied, was well aware of the date and time for the investigation meeting but simply chose not to participate. That being the Authority's conclusion, it is appropriate for the investigation to not be further delayed and for the Authority to issue its determination once that investigation was complete.

Issues

[10] It will be convenient if the Authority considers each of the heads under which Mr McLeod claims he is owed wages and/or that the Trust is in default.

[11] It follows that the issues the Authority needs to consider are as follows:

- (a) The position with average daily pay.
- (b) The claim for sleepover back-pay allowance.
- (c) Costs.

The average daily pay calculation

[12] By s.9A of the Holidays Act 2003 (the 2003 Act) an employer may use average daily pay to calculate payment for public holidays, the alternative holiday, sick leave, or bereavement leave. Average daily pay is supposed to be used when it is neither possible nor practicable to determine an employee's relevant daily pay pursuant to s.9 or if the employee's daily pay varies within the pay period when the holiday falls.

[13] By the definition contained in the 2003 Act, average daily pay is the employee's gross earnings of the preceding 52 weeks (excluding any loading for work on a public holiday) divided by the number of whole or part days during which the employee earned the earnings in question.

[14] The purpose of the s.9A provision in the 2003 Act is to provide another mechanism by which certain holiday pays can be calculated.

[15] While the access to the calculation in s.9A appears to be discretionary (the "*employer may use an employee's average daily pay ...*") the Authority is satisfied that a proper construction of the provision requires that the calculation be made using this section's formula where either it is not practical or possible to determine an employee's relevant daily pay using that concept from s.9(1) of the 2003 Act or where the employee's daily pay varies within the pay period when the holiday falls.

[16] In the present case, the Trust maintain that they have paid Mr McLeod correctly. Conversely, Mr McLeod maintains that by virtue of the actual hours he worked being varied, it followed that his daily pay varied and so the calculation ought

to have been made using the average daily pay concept provided by s.9A of the 2003 Act, rather than a calculation using the basic hourly rate, which the Trust did its calculations on.

[17] The Authority must decide whether in fact it was available to the Trust to complete the calculations using the concept of relevant daily pay, as that concept is defined in s.9 of the 2003 Act, or the concept of average daily pay as that concept is defined in s.9A of the 2003 Act.

[18] In the Authority's opinion, if on examination it becomes clear to an employer embarking on a relevant calculation, that it is not possible to identify precisely what amount of pay the employee would have received if the employee had worked on that day, or the employee's daily pay varies, then the law requires that the calculation be done in terms of s.9A of the 2003 Act.

[19] On the facts, the evidence before the Authority discloses that Mr McLeod's daily pay did vary and thus the Authority is satisfied that the employer ought to have used its discretion to do the calculation in accordance with s.9A of the 2003 Act rather than s.9.

[20] There is provision in the statute for a Labour Inspector to resolve any disputes between the parties in respect to the calculation of pay in these circumstances. Neither party have exercised that option. There are other matters in dispute between the parties and Mr McLeod has chosen to make this application to the Authority instead.

[21] It is apparent to the Authority that Mr McLeod has sought copies of wage, time and holiday records from the Trust and on his evidence (which is accepted by the Authority) that material was not provided to him in its entirety until the filing of the statement in reply by the Trust on 26 October 2012, post dating by some months the termination of the employment.

[22] While Mr McLeod's evidence is that he had sought wage, time and holiday records throughout the employment, without success, a written request was made at the termination of the employment for the same information, and a copy of that document is before the Authority. That letter is dated 16 May 2012 and the provision of the information requested was not to hand until the serving on Mr McLeod of the statement in reply which is dated 26 October 2012. It follows that the Authority is not

satisfied that the Trust has complied with the terms of s.82 of the 2003 Act which requires an employer to satisfy a request for wage, time and holiday records “as soon as practicable”.

[23] On the facts available to the Authority, the Authority finds on the balance of probabilities that Mr McLeod is entitled to a calculation of his pay entitlement for the public holidays, alternative holidays, sick leave and bereavement leave that he worked during the last six years of the employment based on the concept of average daily pay rather than on the concept of ordinary weekly pay. The total claim is \$5,254.89, but that must be rebated because that claim dates from the beginning of the employment on 16 November 2003 and the law only allows the claim to go back for six years, so the total amount allowed by the Authority under this head is \$2971,94 gross.

The sleepover back-pay allowance

[24] Pursuant to the Sleepover Wages (Settlement) Act 2011, the Parliament changed the regime for the payment of staff working for the providers of caring services for persons with various forms of disability.

[25] By Order in Council styled Sleepover Wages (Settlement) (Te Apiti Trust) Order 2012, the Governor General, acting on the advice of the Executive Council, made an order particular to the Te Apiti Trust. The effect of this Order was to provide for two schedules of payments to be made to staff of the Trust performing sleepovers, the first in respect to sleepovers performed prior to 18 October 2011 and the second in relation to sleepovers performed after 18 October 2011.

[26] The Authority has been provided with a schedule of the entitlements, calculated in accordance with the Order in Council, and the Authority is satisfied that that schedule accurately represents Mr McLeod’s entitlement in respect to the sleepover back-pay allowance, save for one proviso.

[27] That proviso is Section 10 of the 2011 Act which is not abrogated by the effect of the Order in Council. Section 10 is clear that where a claim for sleepover payments has not been made by 2 September 2011, the claim is extinguished. Unfortunately for Mr McLeod, that is the position in his case; according to the information he provided to the Authority, the initial claim was made in December 2011, some months after the cut off date.

[28] It follows that, by force of statute, Mr McLeod's claim for sleepover payments cannot even be considered. Only those claims made before the statutory date are able to be entertained and the others are simply extinguished.

Costs

[29] Mr McLeod seeks costs both for initial legal representation totalling \$1,046.50 and for an additional sum of \$1,000 to reimburse Mr McLeod's wife who prepared the calculations for Mr McLeod's claim to the Authority.

[30] The Authority's usual practice is to seek submissions from both parties in respect to costs and it is appropriate that the Trust be given an opportunity to file submissions in the present case.

[31] Accordingly, the Trust has 14 days from the date of this determination to file any submissions they may wish to be considered in respect to the issue of costs.

James Crichton
Member of the Employment Relations Authority