

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 278/09
5156947

BETWEEN CHRISTOPHER MILLS
 Applicant

AND EFFLUENT & IRRIGATION
 DESIGN (NZ) LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Martin Forster for Respondent

Investigation Meeting: 12 August 2009 at Hamilton

Determination: 14 August 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Christopher Mills was employed as a Technician/Installer by Effluent & Irrigation Design (NZ) Limited (“Effluent and Irrigation”) from 28 October 2008 until his employment ended by way of redundancy in February 2009. Mr Mills was given four weeks notice of redundancy by way of a letter dated 21 January 2009, which states Mr Mills’ final day of employment was to be 13 February 2009.

[2] On 4 February Mr Mills received his final pay including holiday pay. He was not paid out the entire period of his notice and seeks payment of the three weeks he was not paid.

[3] On behalf of Effluent and Irrigation, Mr Martin Forster says Mr Mills worked various hours throughout his employment based on the needs of the business and that for the last three weeks of his notice period, there was no work available and therefore no payment due.

[4] Mr Mills was subject to a written individual employment agreement. The relevant clauses state:

Clause 3.1

Your hours and days of work shall be set and offered at the employer's sole discretion and shall be advised to you in advance as far as practicable. You understand and accept that the days of work and the number of hours are likely to change frequently due to the Company's inability to work in wet weather. You also understand and accept that no days or hours are guaranteed and that work shall only be offered as and when it is available and payment will be for hours worked only,

Clause 13

In the event that you are declared redundant, you shall be given 4 (four) weeks notice of termination of your employment or at the discretion of the employer, be paid in lieu thereof. ... [emphasis is mine]

[5] I am satisfied that at the time the letter of termination was written and provided to Mr Mills it was anticipated that Mr Mills would work out his notice period. I am supported in this conclusion by the offer in the letter for Mr Mills to take time off to attend interviews in order to find alternative employment.

[6] Mr Mills worked the week of 19-23 January but on Monday 26 January he received a text message from his Manager advising him there was no work for the rest of that week. Mr Mills attended work the following Monday, 2 February where two fellow employees advised Mr Mills that there was no further work available for him. He received no notification or other communication from his employer.

[7] On 4 February Mr Mills received what he understands was his final pay. He received a further payment on 26 May 2009 being payment for Waitangi Day. Mr Forster told me he was paid for Waitangi Day because he was still within his notice period.

[8] Clause 13 clearly anticipates that if Mr Mills is made redundant he will be given 4 weeks notice. Mr Mills was entitled to work out his notice period, subject to clause 3.1. Alternatively, Effluent & Irrigation could elect to pay him in lieu of him working out that notice.

[9] I find when Effluent & Irrigation paid Mr Mills his final pay on 4 February, before the end of the notice period, it utilised its discretion under clause 13 to pay Mr Mills in lieu of the requirement that he work the notice period out.

[10] I have considered whether clause 3.1 can affect Mr Mill's right to the payment in lieu. At the investigation meeting Mr Forster was clear that the reason Mr Mills did

not receive payment for the notice period related to the fact that there was no work available for him. I note that the three remaining employees did work during at least two of those three weeks which indicates that work was available.

[11] Be that as it may, clause 13 is clear and unambiguous, once the company utilised its discretion to not require Mr Mills to work his notice period out by paying him his final pay, the company were electing the alternative which requires payment in lieu.

[12] Mr Mills was entitled to receive payment in lieu for the three weeks notice that he was not allowed to work. Mr Mills hours were not static and varied from week to week. His average weekly hours throughout his employment was 43. He is entitled to payment of 43 hours at \$18 per hour for each of the three weeks less payment for Waitangi Day which Mr Mills has already received.

Effluent & Irrigation Design (NZ) Limited is ordered to pay to Mr Mills \$2,322.00 gross (less the payment for Waitangi Day) pursuant to section 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[13] Mr Mills is entitled to be reimbursed his application fee on this application.

Effluent & Irrigation Design (NZ) Limited is ordered to pay to Mr Mills \$70 as reimbursement of his costs associated with this application.

Vicki Campbell
Member of Employment Relations Authority