

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 175/09
5122005

BETWEEN BARRY NEWMAN
 Applicant

AND RA and JW URLICH
 Respondents

Member of Authority: R A Monaghan

Representatives: B Newman in person
 RA Urlich in person

Investigation meeting: 29 May 2009

Determination: 2 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Barry Newman says his former employer, RA and JW Urlich (in partnership) owes him unpaid holiday pay. In particular he says he is owed annual leave for each year of his employment for the 6-year period terminating on the date of filing of his statement of problem. With the exception of two periods in 2007, he says he did not take any paid annual leave during that time.

[2] Ron Urlich says Mr Newman used all of his entitlement to annual leave and is not owed any outstanding payment.

Background

[3] Mr Newman was employed as a brewer at the Shakespeare Hotel, which was owned by Mr and Mrs Urlich at the relevant times. The employment relationship ended in 2008.

[4] There was no written employment agreement. Very late in the relationship a written agreement was put to Mr Newman, but the parties were unable to agree on certain of the terms. In particular they were unable to agree on the content of an hours of work clause.

[5] It was common ground that that brewing occurred as necessary for the hotel's needs, and that Mr Newman's duties were not confined solely to the brewing process. They extended to checking and monitoring the fermentation process and the brewing equipment, some maintenance of the brewing equipment, and some delivery duties. In practice, Mr Newman worked the hours he considered necessary. He was given a free hand, and neither he nor his employer kept a record of the hours he worked.

[6] The clause proposed by Mr and Mrs Urlich provided for an ordinary 40-hour, Monday – Friday week. With the agreement of the parties hours of work could be spread over 6 or 7 days per week, provided that no more than 40 hours were worked in any week without agreement.

[7] The clause proposed by Mr Newman recognised the need for flexibility and said the brewer may be required to available for work on weekends and public holidays and for extended hours. It also specified that compensatory time off was to be available at the brewer's discretion provided that beer quality did not suffer. Another provision stated that hours of work were 'as required to ensure supply of beer to Shakespeare Hotel.' A difficulty with Mr Newman's proposal was that it did not specify any core hours and arguably enabled Mr Newman full discretion to work whenever he wished, or on another view enabled Mr and Mrs Urlich to require him to work whenever they wished. While the employer's provision could have been improved on, Mr Newman's was probably too vague to be enforceable.

[8] Mr Newman's claim for three weeks' of annual leave per year, for the six-year period to the date of filing in the Authority,¹ is made on the ground that no leave was taken. The issue between the parties was further identified as whether or not Mr Newman worked during the Christmas – New Year period on each year in question. Because he was paid for these times, if he did not work then he received the annual leave to which he was entitled.

¹ With reference to the limitation period contained in s 142 of the Employment Relations Act 2000

[9] Mr Newman accepted that he took periods of leave totalling 3 weeks, in 2007. The absences were not recorded as leave, and Mr Newman was paid during the relevant periods. Although there was disagreement about precisely how many days should have been counted as annual leave, the state of the record was such that I accept Mr Newman's assessment that three weeks' leave was taken in total.

[10] Accordingly Mr Newman seeks payment for a further 15 weeks of leave not taken, calculated at \$961.54 (gross) per week.

Hours worked over the Christmas – New Year periods

[11] In the absence of any record of when Mr Newman worked, or of when he took leave, some reliance was placed on other records as an indication of when Mr Newman was likely to have been at work. Mr Newman said even those records did not allow for time he spent on wider duties of the kind described above.

[12] Mr Newman produced a marked calendar which he said identified dates on which brewing occurred, as ascertained from brewing or fermentation records. The calendar indicates:

- a. 2002 – 2003: brewing occurred on 6 days during a period including statutory holidays plus working days to mid-January, but there was no brewing in the weeks beginning 14 and 20 January 2003;
- b. 2003 – 2004: brewing occurred on 2 days during a period including statutory holidays plus working days to mid-January, and on only 2 days during January;
- c. 2004 – 2005: brewing occurred on 3 days during a period including statutory holidays plus working days to mid-January, with brewing occurring every day for the rest of January;
- d. 2005 – 2006: brewing occurred on 3 days during a period including statutory holidays plus working days to mid-January, and on 9 days during the whole of December and January;
- e. 2006 – 2007: brewing occurred on 8 days during a period including statutory holidays plus working days to mid-January,

- but there was no brewing in the weeks beginning 8 and 15 January 2007 (when Mr Newman acknowledges he took leave);
- f. 2007 – 2008: brewing occurred on 4 days during a period including statutory holidays plus working days to mid-January, with brewing occurring on 11 days during the rest of January.

[13] There was much debate about what, if any, work Mr Newman did even on the days marked on the calendar. Mr Urlich gave evidence that the Christmas-New Year period is usually slow and he and his family covered staffing requirements during that time. He did not see Mr Newman at work, other than on one occasion when Mr Newman was on the premises for approximately an hour and a half and spent most of that time watching cricket on the television in the bar. For his part Mr Newman denied acting as Mr Urlich said, and said no assumptions could be made about the amount of work he did because many of his duties were carried out off the premises.

[14] The calendar suggests at least that Mr Newman had considerable ‘down time’ during the relevant Christmas – New Year periods. His evidence about the breadth of his duties in general was too vague to persuade me that the down time was likely to have been spent on duties other than brewing in those particular periods, and he was not able to say with any specificity that such was the case. I consider it likely that he had periods of no work, but was paid nevertheless.

[15] An analysis presented on behalf of Mr Urlich addressed the calendar for the entirety of each relevant year. It counted the number of working days available during the year, assuming a 5-day week. It deducted the number of days attending - with reference to the calendar - and further deducted a number of statutory holidays, leaving a number of days ‘unaccounted for’. The number of days ‘unaccounted for’ significantly exceeded the annual leave to which Mr Newman was entitled.

[16] I do not accept that simply describing a number of days as ‘unaccounted for’ is sufficient to establish that the time is properly treated as paid annual leave. Just as the information was too vague to persuade me that the ‘down time’ in the Christmas-New Year period was time worked, nor does this analysis persuade me that the days ‘unaccounted for’ were days not worked.

[17] The inadequate record and the lack of a suitable written employment agreement are unsatisfactory, and responsibility for the failure to properly manage these matters is the employer's. On the other hand, by agreement, Mr Newman was his 'own boss' and the employer was entitled to require him to be more accountable for his time than he was prepared to be. Accordingly, balancing the vagueness of the evidence of both parties and the failure of both to properly observe their responsibilities, I treat the marked days as working days over the Christmas-New Year period, and the remainder as paid days off.

[18] Mr Newman is therefore owed payment in respect of a further 26 days' leave not taken. The calculation is 3.7 weeks x \$961.54 = \$3,557.70 (gross).

[19] Payment is ordered accordingly.

[20] Interest is to be paid at a rate of 5% from the date of this determination to the date of payment.

Costs

[21] Costs are reserved.

[22] If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and copy to the other party a statement of the amount sought in respect of costs, and why. The other party shall have a further 14 days in which to file and copy any reply.

R A Monaghan

Member of the Employment Relations Authority