

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 25  
5399472

BETWEEN                      NICKA PAPER  
Applicant

AND                              SUPERCARE WELLINGTON  
LIMITED  
Respondent

Member of Authority:        G J Wood

Representatives:              Nicka Papera on his own behalf  
Ian Kebbell for the Respondent

Investigation Meeting:        4 March 2014 at Wellington

Submissions Received:        4 March 2014

Determination:                17 March 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr Papera, makes three claims against his former employer, Supercare Wellington Limited. The first two claims relate to travel monies and higher hourly payments he claims were due by a previous employer (Supercare Limited, now in liquidation), but were owed by Supercare Wellington because it took over Mr Papera's employment as a cleaner by way of transfer, as required under Part 6A of the Act (continuity of employment if employees' work affected by restructuring). Mr Papera also claims for eight statutory holidays worked for Supercare, but which were carried over to his employment with Supercare Wellington as alternative holidays owing.

[2]     Supercare Wellington (which has completely different ownership than Supercare had) denies that it is liable for monies allegedly owed by a previous

employer of Mr Papera, but does accept that it was required to honour any alternative leave days owing for him having worked on a public holiday while in the employment of Supercare. However it believes that there is no evidence to support Mr Papera's claim for eight days worked on public holidays and not properly remunerated for.

### **Factual discussion**

[3] Unfortunately, this matter has a long history. On 5 November 2012 Mr Papera filed a claim against Ian Kebbell (Supercare Wellington), which was later clarified through the parties' employment agreement as relating to his employment with Supercare Wellington Limited, for *duress, breach of duty of good faith, mandatory clauses un-assorted, no union*. Mr Kebbell responded on behalf of Supercare Wellington, noting that there was insufficient information provided by Mr Papera for the company to properly respond.

[4] The matter went to mediation and the Authority was informed that it was resolved. Mr Papera was thus informed on 7 March 2013 that the Authority would therefore take no action and had closed the file.

[5] In September 2013 Mr Papera claimed that matters had not been resolved in mediation. Mr Papera was then informed on 2 October that the Authority would take no further action unless there was an amended statement of problem, which clarified what part of the mediated settlement had been breached and how much money was being sought. This was in the alternative to requiring Mr Papera to make a fresh application, which would have been more expensive for him.

[6] On 29 November 2013 Mr Papera filed an amended statement of problem against Supercare Wellington Limited, attaching a copy of the record of settlement and raising three new claims. First, he sought \$3,300.00 for unpaid travel allowances relating to the period 19 December 2010 to 25 March 2012, a period when he was employed by Supercare. Second, he claimed \$3,550.50 because he believed he should have been paid \$20 per hour for work completed at Newlands College, again for a period when he was employed by Supercare. Third, Mr Papera claimed \$4,018.00 for eight statutory holidays he claimed he worked between 2011 and 2012, again while employed by Supercare. The claim for \$4,018.00 was on the basis that he had only been paid ordinary time for those dates worked, and should have been paid time and a half (or triple time) and that he was entitled to a day in lieu as well.

[7] In its statement in reply filed on 12 December 2013 Supercare Wellington noted that the settlement made with Supercare Wellington Limited in mediation was a full a final settlement and that no new matters could be raised. Given that Mr Kebbell (Supercare Wellington's principal) believed that Supercare Wellington had met the terms of settlement there was said to be no case to answer.

[8] A conference call was held to pursue matters on 10 February 2014. At the conference call the Authority made it clear at the commencement that there were three claims for determination. Mr Papera was reminded that he had entered into a settlement with Supercare Wellington and was asked which claims were therefore still outstanding. After originally saying that it was travel allowances and unjustified dismissal, Mr Papera clarified that there was only one claim remaining and that it was now *down to travel expenses*. Mr Papera was again asked which claims did he want the Authority to consider and Mr Papera confirmed that it was travel expenses only. At the end of the conference call the Authority confirmed that the travel claim was the only matter being pursued and therefore the other claims were dismissed.

[9] However Mr Papera informed a support officer several days later that he still intended to pursue all his three claims. He then filed some pay slips and wage summary information in support of his claims.

[10] At the investigation meeting Mr Papera again stated that he wished to pursue all his three claims. When informed of his position at the conference call, he stated that he *may have made a mistake* on the call. Mr Kebbell was very clear that the other claims had been withdrawn and dismissed and that he had not prepared to respond to them.

[11] I determined, in the interests of justice, to hear all of Mr Papera's claims. These claims must be assessed in the light of the following circumstances. First, Mr Papera's employment transferred from Supercare Limited to Supercare Wellington Limited around 4 July 2012, the date when the parties entered into an employment agreement. This being a cleaning operation, it was clear that pursuant to Part 6A of the Act Mr Papera had elected to transfer his employment to Supercare Wellington on the same terms and conditions as with Supercare, with his employment being treated as continuous. Under s.69J of the Act, it is clear that the new employer, Supercare Wellington, also had to recognise his entitlement to any alternative holidays under

s.61 of the Holidays Act 2003 that had not been taken or exchanged for payment before the date of transfer.

[12] Second, after Mr Papera's employment with Supercare Wellington ended, the parties entered into agreed terms of settlement to their employment relationship problems. Materially, the settlement terms included the following:

3. *The Applicant is entitled to all accrued leave including for the period with the immediate predecessor employer prior to his employment with the Respondent as this transferred across to the new employer at the time of purchase.*
4. *The Respondent acknowledges that the Applicant has a claim for travel expenses as this was also part of his entitlements transferred across at the time of purchase.*
5. *The Respondent will provide the Applicant's solicitor with wage and time records for the full period of employment over both employers by 5pm Friday 8 March 2013 and will pay the Applicant as provided for below all outstanding amounts within 7 days of the date hereof. The parties reserve their respective rights in respect of any calculations of leave or allowances as set out above. ...*
11. *This is the full and final settlement of all matters between the Applicant and Respondent arising either currently or at any time in the future out of their employment relationship and the termination thereof.*

[13] Fourth, I accept Mr Kebbell's evidence that wage and time records, as provided to the Authority, were, as required under the settlement agreement, provided to Mr Papera's then lawyer by 12 March 2013. Unfortunately the pay records do not show whether Mr Papera worked any particular statutory holidays or not. As Mr Kebbell pointed out, if Mr Papera was not required to work on a statutory holiday then he would still have been paid for his regular hours, as that is what is required under the Holidays Act.

[14] Fifth, no further action was taken by Mr Papera until contacting the Authority in September 2013.

### **Determination**

[15] Mr Papera's claims for travel money and \$20 per hour for work completed at Newlands College are dismissed. The \$20 per hour claim could not succeed because

it related to a period before Mr Papera was employed by Supercare Wellington. While his terms and conditions were transferred across pursuant to Part 6A of the Act there is nothing in the Act (or otherwise in law) that requires obligations owed by a previous employer to be met by a new employer unless they relate to leave not taken, as specifically provided for under s. 69J(2). This was not a matter related to leave, but to payments that should have been pursued with Supercare, not Supercare Wellington. Furthermore, the settlement agreement between the parties only allows for Mr Papera to pursue claims in respect of travel expenses and statutory holidays. This is another reason why this claim could not succeed.

[16] Similarly, the claim for travel expenses cannot succeed because it relates to the period when Mr Papera was employed by Supercare Limited. As noted above, Supercare Wellington was not required to honour any debts owed by Supercare in relation to travel expenses.

[17] Finally, I turn to the claim for statutory holidays. I note that it is for Mr Papera to establish his claims for alternative holidays owed in lieu for working on statutory holidays. I take the following factors into account. Mr Papera was adamant that he had worked the eight days claimed while in Supercare's employment, as required by it, but had been paid at only standard rates and had never been given any days in lieu for working on the statutory holidays, either by Supercare or Supercare Wellington. It is fundamental to the law that cleaners on a cleaning contract whose employers change are not paid out for such holidays, but that they transfer to the new employer.

[18] On the other hand, there are a number of factors that give question to the claim. First, Mr Papera claims that he has timesheets which show that he worked the eight days in question. However no such timesheets have ever been produced to the Authority or to Supercare Wellington.

[19] Second, there is no evidence that Mr Papera ever took these matters up with Mr Paul Fraser, the principal of Supercare, his employer at the time Mr Papera claims to have worked the statutory holidays without proper payment. Mr Fraser has informed Mr Kebbell that Mr Papera was properly paid for all statutory holidays, and that while there may have been occasions when Mr Papera did work on a statutory holiday that was at his election. In particular, it was suggested that Mr Papera often chose to work on a statutory holiday falling on a Monday, rather than do the cleaning

he would otherwise have been required to do on a Sunday. In such circumstances Mr Papera would not be entitled to be paid for the additional payments involved in working on a statutory holiday, because he had not been required to work on the statutory holiday. Such days would have covered four of the statutory holidays Mr Papera says that he worked in 2011-2012.

[20] Third, Mr Kebbell's evidence was that these issues had never been raised at all with Supercare Wellington until the amended statement of problem, more than six months after he believed Supercare Wellington had met all its obligations under the settlement agreement.

[21] Fourth, Mr Papera made it clear in evidence that he was still upset that he has been unable to pursue claims against Supercare (as it is in liquidation) and Supercare Wellington (due to the settlement agreement), that he does not accept there is any difference in law between the different companies (despite their different owners and different names) and wishes to find any way he can to pursue either or both of them.

[22] Fifth, Mr Papera's claim is for \$4,018.00. Given that he was paid \$18 per hour, to claim \$4,018.00 as Mr Papera has, he would have had to have worked over 18 hours per day even if claiming at time and half for each day, and that is simply not credible. His claim, when questioned about that, that under the Employment Relations Act such work should be paid at triple time is without foundation.

[23] It is for an applicant to establish his claim and I conclude, for all the reasons given above, that Mr Papera has not made out his claim to be paid for any alternative days for statutory holidays worked.

### **Costs**

[24] Costs are reserved. As Mr Papera's claims have all been dismissed Supercare Wellington is entitled to claim for costs. However, ordinarily, only legal expenses directly related to the investigation meeting (and not for example in preparing a statement in reply) can be claimed, and to date there has been no evidence of such direct legal involvement.

**G J Wood**  
**Member of the Employment Relations Authority**