

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 171
5550728

BETWEEN GEMMA PARKIN
 Applicant

A N D HORIZONS UNLIMITED
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
 Mark Smith, Advocate for the Respondent

Investigation Meeting: 23 and 28 September 2015

Date of Determination: 12 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Parkin) alleges that she is owed unpaid annual leave and unpaid public holiday leave. The respondent (Horizons) agrees that there is payment due for statutory holidays but denies that there is any annual leave to be paid for.

[2] Horizons is a small company which provides training services for a variety of clients. By virtue of the nature of its business, hours of work tend to be very flexible and all staff need to be prepared to work outside of normal office hours. It is common cause between the parties that the hours of work are as I have just described them.

[3] What is in issue is whether or not there was agreement between the parties that work required to be performed outside of those normal office hours would attract some form of time off in lieu (TOIL).

[4] Ms Parkin's claim is that there was an informal understanding that there should be TOIL for all the unsociable hours that the job required and while Horizons agree that there was always some latitude because of the unsociable nature of the hours the business required, Horizons denies that there was ever a formal agreement and in particular denies absolutely that there was ever what I could only describe as a "*one-for-one*" basis for TOIL, that is to say a day off for each unsociable day worked.

[5] Ms Parkin worked for Horizons for most of two calendar years in a role styled Business Area Manager and when she left the employment at the end of calendar 2014, she left on good terms with Horizons.

[6] After the employment terminated, Ms Parkin sought payment for holiday leave that she claimed had not been taken and for public holidays that she claimed had not been taken. In my investigation of the matter, I satisfied myself that Ms Parkin was absolutely correct that she was owed public holidays totalling six days and Horizons accepts that that sum is owed.

[7] However, in respect to the claim for unpaid annual leave Horizons says that Ms Parkin has taken her annual leave and is therefore not due anything by way of payment now that the employment has come to an end. Indeed, Horizons goes further and says that it would appear that Ms Parkin has taken in excess of the annual leave to which she is actually entitled pursuant to contract but it does not desire to take that issue any further.

[8] For her part, Ms Parkin says that she took no annual leave at all during the employment and that the time off that she had (which the employer has recorded as annual leave) was in fact TOIL. Given that the employer disputes that there was ever a settled understanding of TOIL to the extent claimed by Ms Parkin now, the annual leave issue remains in dispute.

[9] As part of my investigation, I did explore with the parties whether there was some prospect of the matter being settled by agreement, particularly as there appeared to have been some attempt to resolve matters on that basis before the issue came before the Authority, but I was not able to have matters disposed of in that way.

[10] For the sake of completeness I also observe that there was a signed individual employment agreement which has a provision which is as clear as can be touching on the issues between the parties:

6. *Hours of work*

6.1 *Full time hours with an obligation to perform overtime as necessary but without extra payment. The employee's normal hours of work shall be 40 per week between the hours of 8.30am and 5.30pm on Monday to Saturday. The employee may also be required to perform such overtime as may be reasonably required by the employer in order for the employee to properly perform their duties. The employee's salary fully compensates them for all hours worked.*

[11] In addition to that, it is common cause that all staff seemed to work with a fair degree of autonomy, that no standard working hours were required by the employer and that staff did what was necessary to fulfil their obligations but not within a strict day-to-day office regime. So far as Horizons was concerned, that was the extent of any understanding about time off in lieu and Horizons maintained, for instance, that Ms Parkin took proper advantage of that flexible working hours arrangement, as did other staff.

[12] Moreover, the individual employment agreement contains a variation clause which provided that any variation to the employment agreement could only be effected if it was in writing and signed by both parties. Neither party can direct me to any signed variation.

The issues

[13] The only issue for determination in the present case is how to label the time off that both parties acknowledge Ms Parkin took during the employment. For her, the time off was TOIL whereas Horizons says that it was the annual leave that she was entitled to.

[14] The question then for the Authority was whether Ms Parkin has any entitlement to payment beyond that which she has already received from Horizons.

Does Horizons owe Ms Parkin any further moneys?

[15] I have already made clear, and Horizons accepts, that it owes Ms Parkin six days of unpaid statutory holidays but I have not been persuaded that Ms Parkin has any other entitlement.

[16] This is because the employment agreement is clear that there is an expectation that staff will work whatever hours are required in order to fulfil their obligations, that what is loosely called overtime in the employment agreement is required but is not subject to additional payment and that the salary paid by Horizons to staff is to “*fully compensate them*” for the hours that staff work.

[17] In those circumstances, it is difficult to see how, in the absence of a formal variation which as I have just noted does not appear to exist, there can be any entitlement of the sort that Ms Parkin claims.

[18] There is no doubt that she has taken off a significant number of days during the employment which the employer has recorded as annual leave but which Ms Parkin maintains is TOIL and her claim now is that she is owed 25 days’ annual leave by virtue of the fact that the net position during the employment was that the time that she took off was not annual leave but TOIL.

[19] But in the absence of any agreement that TOIL on the basis that Ms Parkin applied it was in play in the workplace, it is difficult to avoid the conclusion that her view that the time off was TOIL rather than annual leave is simply a unilateral decision which her employer has not bought into.

[20] It is certainly true that there was a high level of flexibility in this workplace for obvious reasons and Horizons says that Ms Parkin took full advantage of that but that it was never in Horizons’ contemplation that for every Sunday that Ms Parkin (or any other staff member) had to work, they were entitled to a like number of hours or days as TOIL.

[21] Indeed, given the clear words in the individual employment agreement, it would appear to me necessary for any such arrangements to be recorded in writing as a variation to the employment agreement and I have not been provided with any such document.

Determination

[22] For reasons just advanced, I have not been persuaded that Ms Parkin is entitled to any additional payment from Horizons other than the payment for six days of statutory holidays which Horizons acknowledges are due and owing to Ms Parkin.

Costs

[23] The parties both acted for themselves and therefore there is no issue as to costs.

James Crichton
Member of the Employment Relations Authority