

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 185
3022696

BETWEEN

DEAN PATON

Applicant

A N D

CONSTEEL LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Matt Jones, Advocate for Applicant
Tiffany McRae, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: None received by agreement

Date of Determination: 12 December 2018

**SECOND DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] In a determination dated 9 October 2018¹ the Authority noted² that Mr Paton had been underpaid for his holiday pay as he was contractually entitled to 28 days' annual leave per year. The parties agreed to deal with this issue between themselves, but were given leave to apply to the Authority if they could not agree what was owed.

[2] In an email to the Authority dated 30 November 2018 Ms McRae stated that the parties have been unable to agree what was owed to Mr Paton and asked for the opinion of the Authority. The Authority indicated that it could issue a determination setting out how Mr Paton's entitlement could be calculated, and asked whether the parties wished to make submissions. Neither party wished to do so.

¹ [2018] NZERA Christchurch 143

² At [71]

[3] This determination therefore resolves the matter of how to calculate whether outstanding holiday pay is owed to Mr Paton.

[4] Although the parties did not make submissions, Ms McRae stated in her email that the respondent had been advised by its payroll company and by the Ministry of Business, Innovation and Employment³ that Mr Paton was only entitled to 8% of his gross earnings when he left the employment of the respondent as he had not worked 12 months. Ms McRae said that both organisations also suggested that the amount of the holiday entitlement does not increase the percentage of holiday pay owing to the employee. Therefore, the respondent believes that Mr Paton has been paid everything that he is owed in respect of his holiday pay entitlement.

Discussion

[5] The individual employment agreement between Mr Paton and the respondent stated, at clause 12, the following:

12. **Holidays**

12.1 The Employee shall be entitled to paid annual leave as set out in this clause. This clause is in substitution for and not in addition to the entitlements in the Holidays Act.

- The Employee shall be entitled to 28 days annual leave per year;
- The Employee's entitlement shall accrue on a pro-rata basis during each month of their employment from the first day of their employment.

12.2 If the employee leaves their employment before becoming entitled to enough annual holidays to cover the amount of annual holidays they took in advance:

- The employer may recover the amount paid to the employee for holidays taken in advance that is not covered by the employees annual holiday entitlement.

³ Presumably, the MBIE Employment New Zealand Contact Centre.

12.3 This clause is subject to the Wages Protection Act 1983. The employee's signature will satisfy the written consent requirement of section 5 of the Wages Protection Act 1983.

[6] Section 6 of the Holidays Act 2003 provides:

6 Relationship between Act and employment agreements

(1) Each entitlement provided to an employee by this Act is a minimum entitlement.

(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

[7] Section 16 of the Holidays Act provides that, at the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays. Section 23 provides as follows:

23 Calculation of annual holiday pay if employment ends within 12 months

(1) Subsection (2) applies if—

(a) the employment of an employee comes to an end; and

(b) the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of section 16.

(2) An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount—

(a) paid to the employee for annual holidays taken in advance; or

(b) paid in accordance with section 28.

[8] Mr Paton was employed for less than 12 months. The question is, does s 23 apply to the entirety of Mr Paton's holiday entitlement, including under his individual employment agreement, or does it only apply to the statutory minimum of 4 weeks' paid annual holidays?

[9] I am satisfied that s 23 deals only with the statutory minimum of 4 weeks' paid annual holidays. I reach this conclusion because a departing employee with less than 12 month's continuous employment who has only his or her statutory rights under the Holidays Act has not accrued any annual holiday. The right under s 23 to 8% of the gross earnings is in recognition of that fact. It can be contrasted with s 24 which entitles the employee to be paid for the portion of annual holidays accrued but not taken.

[10] Section 6 of the Holidays Act allows an employee and an employer to agree enhanced holiday rights. Clause 12 of the employment agreement between Mr Paton and the respondent is therefore binding as it gives Mr Paton enhanced rights (to 28 days' annual leave rather than to 4 weeks). It also provides that the right accrues on a monthly basis from the first day of employment, instead of having to wait 12 months.

[11] Therefore, Mr Paton's right to holiday pay must be calculated in accordance with clause 12 of the employment agreement rather than s 23 of the Holidays Act. Whilst the clause does not expressly say that accrued but unused annual leave must be paid out to a departing employee, I infer that that was the intention given that the respondent reserved the right to deduct pay in respect of annual leave that had been taken but which had not accrued. There is no express clause stating that accrued but untaken annual leave would be lost upon termination of employment.

How should Mr Paton's entitlement be calculated?

[12] During each month of Mr Paton's employment he was entitled to 2.34 days of annual leave. As the accrual has been expressed to be on a monthly basis, rather than a daily basis, I infer that the intention was that complete months of employment only should count.

[13] Mr Paton started work on 13 March 2017 and his employment ended on 12 September 2017. That is exactly six months of employment. Mr Paton had therefore accrued exactly 14 days' annual leave as at the last day of his employment.

[14] From this total entitlement must be deducted the days of annual leave that Mr Paton actually took during his employment. This will leave a balance of X days leave for which he is entitled to be paid.

[15] As Mr Paton was paid hourly, the next step is to calculate the average number of hours worked per day. This should be calculated by dividing the total number of hours worked by Mr Paton during his employment by the total number of days he worked. This will give a total of Y hours per average day.

[16] The next step is to calculate a dollar value for each average day. This is calculated by multiplying Y hours by \$19. This gives a dollar value per day of \$Z.

[17] Mr Paton's accrued but untaken gross holiday pay will therefore be X days multiplied by \$Z. From this sum should be deducted any final holiday pay already paid.

[18] I hope that this determination will enable the parties to finally work out what is owed to Mr Paton by way of final holiday pay. However, if there is any further disagreement then either party may apply to the Authority for a further determination.

Costs

[19] Neither party applied for costs arising out of the first determination. As no submissions were prepared for the current matter, I presume that few if any costs have been incurred. However, if either party wishes to apply for a contribution towards their legal costs arising out of the current matter, they should serve and lodge a memorandum within 14 days of the date of this determination setting out the contribution sought, and the basis for it, and the other party shall have a further 14 days within which to serve and lodge a memorandum of reply.

David Appleton
Member of the Employment Relations Authority