

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN David Perfect (Applicant)
AND Waikato Institute of Technology (Respondent)
REPRESENTATIVES Simon Scott, Counsel for Applicant
Gillian Spry, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 9 May 2006
DATE OF DETERMINATION 19 July 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Perfect alleges he was underpaid wages owing for the entire period of his employment with the respondent, Waikato Institute of Technology (Wintec). He seeks arrears of wages in the sum of \$14,332.50 gross. He also seeks costs in the matter.

The respondent accepts there may be arrears of wages owing in respect of a limited period of Mr Perfect's employment with Wintec i.e. from 18 August 1999 to 31 March 2000. It denies arrears of wages are otherwise owed to Mr Perfect.

Background

On 29 March 1999 Mr Perfect commenced employment with Wintec. He was employed as an Outdoor Technician-Horticulture and initially he was employed on a fixed term contract for one year (expiry 31 March 2000). From 30 March 2000 Mr Perfect was employed in the same role on a permanent basis.

In respect of the first period of employment, the evidence shows that Mr Perfect received an offer of employment dated 26 March 1999. Attached to that offer was a document headed Acceptance of Offer. The offer set out details of the position offered (Outdoor Technician-Horticulture) for a fixed term (29 March 1999 to 31 March 2000) at the rate of \$12 per hour. That offer stated the hours of work as 37.5 per week. Mr Perfect was required to confirm his acceptance of the offer by signing and returning the Acceptance of Offer document and in doing so was also required to select whether he wished to be covered by one of two employment contracts available i.e. the individual contract or a collective contract. Mr Perfect accepted the offer of employment and elected to be covered by the individual employment contract.

That contract, which was signed by Mr Perfect on 14 April 1999, describes a full time employee as “*an employee who undertakes the duties of a position for the ordinary weekly hours of work (i.e. 37.5 hours)*”. The Hours of Work clause (Cl 12) describes the ordinary hours of work as 37.5 hours per week for full time employees. In Clause 13 Overtime – overtime is defined as hours worked in excess of 37.5 per hour and requires the written approval of the employer. It is compensated by time off in lieu or, if agreed, it is paid at T1 ½.

The pay records for this period of employment show that Mr Perfect was paid for 37.5 hours per week.

Despite this contractual record of the hours of work agreed to by Mr Perfect and the relevant pay records, the evidence discloses that at the time Mr Perfect was employed on the fixed term contract his manager, Mr Steenstra, required him to work 40 hours per week because there was a requirement that he be able to work at the Avalon Campus and at the Hamilton Gardens Campus of Wintec and this entailed some travel between the two sites.

After the initial period of employment Mr Perfect was offered permanent employment by Wintec. Again the offer was set out in a letter with an attached Acceptance of Offer document that set out the terms of the engagement. That document records the offer of a full time permanent position as an Outdoor Technician. The proposed hours are 37.5 per week and Mr Perfect is offered a salary of \$24,960 per annum. This Acceptance of Offer document was signed by Mr Perfect on 14 April 2000. Mr Perfect again elected to be covered by an Individual Employment Agreement (which describes full time work as 37.5 hours per week). The associated job description records the hours of work to be 37.5 hours per week.

As a permanent employee that only substantial change in the employment terms was that he was no longer required to work at Avalon Campus.

The evidence of Mr Steenstra is that at the time that Mr Perfect became a permanent employee, he had discussions with HR regarding the hours to be worked by Mr Perfect. At that time he was advised that it was Wintec’s policy that full time hours were 37.5 per week and that was the basis on which Mr Perfect was to be employed as a permanent employee. Mr Steenstra said he was embarrassed to be told this because he had previously required Mr Perfect to work 40 hours per week. He said it was a learning experience for him and he made a specific point of advising Mr Perfect, at the time he became a permanent employee, that his hours of work were 37.5 per week. Mr Perfect denies this conversation.

On 22 August 2001 Mr Perfect elected to join the Union (TIASA). He signed an application to join the Union and in that form he recorded his position and stated that he was a full time employee and his hours were 37.5 per week. Mr Perfect described the tabling of this document as “humiliating”.

From the time he joined the Union, Mr Perfect’s employment was covered by the Allied Staff Collective Agreement to which Wintec and TIASA were party. That CEA describes a full-time employee as “*an employee who undertakes the duties of a position for the normal hours of work (i.e. 37.5 hours per week)*”. The Hours of Work clause in the Collective (Cl. 5) describes ordinary hours as “*37 hours 30 minutes per week*”.

The pay records show that throughout the period of permanent employment Mr Perfect was paid for 75 hours per fortnight (i.e. 37.5 hours per week).

The evidence also discloses that Mr Perfect was the beneficiary of generous discretionary paid (unrecorded) leave. This discretionary leave was granted to him in relation to the serious health problems of his baby son.

Mr Perfect resigned his employment in March 2004. His last date of employment with Wintec was 19 March.

Position of the Parties

The applicant

Mr Perfect submits that when he commenced his employment with Wintec he was told his hours of work were from 8am to 4.30 pm with ½ an hour for lunch. It is his evidence that when he was appointed to the permanent position in March 2000 Mr Steenstra specifically told him there would be no change to his hours and he continued to work the hours he always had.

Mr Perfect said that when he resigned his employment he met with Mr Steenstra and Mr Brougham (Horticulture and Forestry Programme Manager). He said that at that meeting Mr Steenstra questioned the hours he was working. He told Mr Steenstra he worked 8 am to 4.30pm with a ½ hour for lunch. It was Mr Perfect's evidence that Mr Steenstra feigned puzzlement at this and this puzzlement was for the benefit of Mr Brougham.

Mr Perfect said this conversation sparked a concern for him over the hours he had been working and he discussed it with his wife and discovered he had been working 40 hours per week but had only been paid for 37.5 hours per week.

He also said that Mr Steenstra had only required him to work out two weeks of the four weeks notice required. He believes that Mr Steenstra did this to cover his back in respect of the mistake he had made over the hours worked.

As a result Mr Perfect now seeks to recover arrears of wages at overtime rates for the extra 2.5 hours he worked per week for the entire period of his employment from 29 March 1999 to 19 March 2004.

Mr Donaldson gave evidence supporting Mr Perfect's position. He said he was a student and he was employed by Wintec over the summer recesses of 2002/3 and 2003/4. He said that when he discussed his employment with Mr Steenstra he was told, "to work the hours that David worked". He said that throughout his employment he worked from 8am to 4.30pm with a ½ hour for lunch – the same hours as David Perfect.

The Respondent

It was the respondent's position that Mr Perfect was employed by Wintec as a full time employee initially on a fixed term contract and then as a permanent employee. A full time employee is an employee who works ordinary hours of 37.5 per week. The respondent pointed to the substantial documentation which supported this position - offers of employment, acceptance documents, contracts, job description, performance appraisals, pay records and Mr Perfect's own pay slips to support the position that Mr Perfect was employed as a full time employee to work 37.5 hours per week and paid accordingly.

Having said this, Wintec's witnesses recognise that when Mr Perfect was originally employed (on the fixed term contract) Mr Steenstra told him his hours were 40 per week. However, when Mr Perfect was engaged as a full time permanent employee from March 2000 there were discussions between Mr Steenstra and Dianne Halifax of HR where it was confirmed to Mr Steenstra that Mr Perfect was to be employed for 37.5 hours per week, as were all full time employees at Wintec. It was Mr Steenstra's evidence that he felt silly he had not previously been aware of this and that he made a specific point of telling Mr Perfect his hours were to be 37.5 per week.

It was the evidence of the respondent's witnesses that Mr Perfect had extreme flexibility in the management of his time and work and had no direct supervision. Further, he was granted generous discretionary paid (unrecorded) leave in relation to the difficult personal circumstances he and his family faced with a seriously ill baby.

Both Mr Steenstra and Mr Brougham deny having a conversation with Mr Perfect after his resignation about his hours of work. They both say that there was only one discussion where they met with Mr Perfect together after his resignation and that meeting focussed on operational matters associated with the handover of Mr Perfect's duties given his impending departure.

It was accepted that Mr Steenstra offered to allow Mr Perfect to leave his employment without working out his full period of notice. This offer was made to accommodate Mr Perfect's wish to start his new job as soon as possible. He was excited at the new job prospect and allowing him to work reduced notice was just another example (among many) of Wintec accommodating Mr Perfect.

Discussion and Findings

Credibility

I found Mr Perfect and Mr Donaldson to be witnesses without credibility.

This employer had a wealth of documentary evidence (including documents signed by Mr Perfect) to support a finding that Mr Perfect was employed, worked and was paid for 37.5 per week and it defies belief that he could have worked for Wintec for 5 years in the mistaken belief that he was required to work 40 hours per week whilst he was paid only for 37.5 hours per week.

Any doubt on this point was eliminated (with corresponding damage to Mr Perfect's credibility) on the tabling of the application form he filled in and signed when he applied to join TIASA on 9 August 2001. This document shows conclusively that at that date Mr Perfect was aware his hours of work were 37.5 per week.

In Mr Donaldson's case, the records show that he was employed as a casual worker, working hours as required. His own pay claims show that (when he worked) he commonly worked 6 - 7.5 hours per day with a range from 2 hours to 7.5 hours. On the records made available to the Authority he never worked more than 7.5 hours per day. Why he would give evidence in the Authority that he worked 40 hours per week (the same as David) in the face of documentary evidence completed by him that shows otherwise is difficult to fathom.

On the other hand I found the respondent's witnesses to be consistent and credible particularly in respect of its admission (contrary to its own interests) that it had been discovered that Mr Perfect had been told at the commencement of his employment that he was to work 40 hours per week. The respondent acknowledged this left it exposed to the claim of having underpaid him for a period.

I also accept the respondent's evidence and submissions that the documents introduced by Mr Perfect (as supporting his position that he was required to work 40 hours per week) were in fact isolated documents that surfaced and were evidence of Mr Steenstra's mistaken belief that Mr Perfect could be employed for 40 hours per week. They are, I find, part of the train of communications that led to the identification of the original mistake made over David's hours – a mistake which was rectified in discussions between Mr Steenstra and Ms Halifax in the lead up to Mr Perfect being offered permanent employment with Wintec.

As a result of these credibility findings I find that where the evidence of the parties is in dispute it is the evidence of the respondent's witnesses that I prefer.

Findings

I find that Mr Perfect was initially employed on a fixed term contract from 29 March 1999 to 31 March 2000 on an hourly rate of \$12 per hour. While the contractual documents and pay records show that Mr Perfect was engaged to work and was paid for 37.5 hours per week he was told by his Manager, Dom Steenstra, that he was to work 40 hours per week. I accept Mr Perfect worked in accordance with this direction.

However, I find that when that Mr Perfect's fixed term employment expired and it was proposed that he become a permanent employee, discussions took place between Mr Steenstra and HR where it was confirmed that Mr Perfect was to be employed for 37.5 hours per week. I find that Mr Steenstra advised Mr Perfect of this change and all subsequent employment documentation including his IEA consistently reflected these hours of work.

As a result of these findings I must also find that it is not the case that Mr Perfect found out he was working 40 hours while being paid for 37.5 hours at the time he resigned his employment. He knew from the time he was engaged as a permanent employee that his hours were to be 37.5 per week and he confirmed this in his own hand when he applied to join TIASA on 9 August 2001 where he recorded his hours of work as 37.5.

I also find that Mr Perfect did work in accordance with the contracted hours of 37.5 per week. This is confirmed by the fact that he applied for and was granted Time off in Lieu of hours worked over 37.5 per week. I also find he was granted generous paid and unrecorded leave to manage his difficult family circumstances. Wintec was I find exceptionally generous towards Mr Perfect in this regard.

In conclusion, I find, there has been an underpayment by Wintec of hours worked by Mr Perfect in the initial period of his employment. Recovery of arrears for that period is however impacted by s.142 of the Act – Limitation period for actions other than personal grievances.

No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

I find this cause of action arose at the time Mr Perfect received his first pay slip after commencing his employment with Wintec in March 1999. Despite the wealth of information available to him to point out the contradiction between his contracted hours and the hours he was asked to work he took no action to remedy the problem when it arose.

Mr Perfect commenced his action in the Authority on 19 August 2005. Pursuant to s.142 then, I find that Mr Perfect may not recover arrears in respect of the period 29 March 1999 – 18 August 1999.

Determination

Note: Over the period of Mr Perfect's employment overtime was compensated by time off in lieu. That form of compensation is not now possible and as the extra hours were essentially worked as ordinary hours I find it is reasonable that arrears be calculated on the base rate of \$12 per hour.

I direct the respondent to pay to the applicant arrears of wages for the period 19 August 1999 to 30 March 2000 for 2.5 hours per week at the applicable hourly rate of \$12 per hour. I leave it to the respondent to make the necessary calculations and forward the appropriate sum to Mr Perfect. If there is disagreement over the sum in question, I give leave for the parties to refer the matter back to the Authority for determination.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined. The parties should be warned however, that as Mr Perfect has been largely unsuccessful in his claim, that I will take some persuading that costs should not lie where they fall.

Janet Scott
Member of the Employment Relations Authority