

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 548
3043555

BETWEEN DANIEL SAUNDERS
Applicant

AND RUSSELL LILLEY
CONSTRUCTION LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, counsel for the Applicant
Paul Brown advocate for the Respondent

Investigation Meeting: 10 May 2019
Further information received: May and September 2019
Submissions received: 8 July 2019 from the Applicant
12 July 2019 from the Respondent

Date of Determination: 24 September 2019

DETERMINATION OF THE AUTHORITY

- A Mr Saunders does not succeed in his claims for holiday pay and payment for public holidays.**
- B The Authority does not have jurisdiction to determine any issues under the indemnity provision in the shareholders agreement that may impact on costs.**
- C Taking a cautionary approach costs are reserved in the Authority.**

Employment Relationship Problem

[1] Daniel Saunders says that he is owed holiday pay and pay for working on public holidays for the period he worked for Russell Lilley Construction Limited (RLC) from 2005 through to October 2013. He was a director of RCL and held 49% of the shares in the company.

[2] Mr Saunders application was lodged with the Authority on 30 October 2018. He says that RLC has breached section 81 of the Holidays Act 2003 by failing to maintain and disclose on request a holiday and leave record and a record of additional hours he worked.

[3] Mr Saunders claims reimbursement for holiday pay, and payment for public holidays, for the period October 2007 to October 2013 together with interest and costs.

[4] RLC do not accept that Mr Saunders has a claim for holiday pay, public holidays or alternative days. It does not accept that it has failed to maintain and disclose on request a copy of the holiday and leave records of Mr Saunders. It says that the applicant is seeking records from the previous eleven years. Over that time the company used a variety of software systems to record wage and time records and some of the records [Quicken Books] have been superseded by more modern software.

[5] RLC counterclaims on the basis of a provision in an agreement for sale and purchase of shares. It was signed at or about the time the employment relationship ended. Under clause 8 (b) of that agreement it provides an indemnity amongst other matters as below:

The vendor agrees to bear a 49% share of any claim or costs in respect of any liability arising after the date of settlement but relating to the period prior to settlement.

[6] Liability is limited to \$50,000. RLC claims that this agreement was an integral part of the termination of the employment agreement and that Mr Saunders is liable for 49% of any amount awarded to him and for 49% of any costs incurred in defending the claim.

[7] Mr Beck in his submission asked that the parties be directed to resolve the matter themselves with a timetabled path. Mr Brown does not support that approach. I am not inclined to approach the matter in that way. There was an opportunity for the parties to

discuss matters earlier and there was no suggestion that would be of assistance. I shall proceed to determine this matter.

The issues

[8] The Authority needs to determine the following issues in this case:

- (a) What does the Holidays Act 2003 provide for the period of retention of records?
- (b) Did RLC keep any records and what did it disclose?
- (c) If there are no records or the records are incomplete then what is the approach under the Holidays Act 2003?
- (d) Is Mr Saunders owed holiday pay and if so how much?
- (e) Did Mr Saunders work on public holidays?
- (f) Was Mr Saunders required to work on public holidays?
- (g) If there was a requirement to work public holidays and they were worked what is owed for working and/or alternative days?
- (h) Does the Authority have jurisdiction to deal with issues with respect to the sale and purchase of shares agreement.

What does the Holidays Act 2003 provide for the period of retention of records?

[9] It was confirmed in a recent Employment Court judgment that it is not a breach of s 81(4) of the Holiday Act 2003 (HA) if an employer does not keep the information required to be entered to the holiday and leave record beyond six years from the date on which the information is entered into the record.¹

[10] After Mr Saunders relationship ended with RLC some emails were exchanged between him and the General Manager of RLC, Jeanette Ellis, asking for some clarity about his holiday payment. One of the emails from Ms Ellis could support a conclusion no records had been kept. Mr Saunders remained unsatisfied about whether he had been paid his holiday

¹ *Shane Hatcher v Burgess Crowley Civil Limited* [2019] NZEmpC 117

pay correctly or not. It is objectively unfortunate that the parties did not talk further at that time however I understand the relationship had deteriorated.

[11] The next time the issue about holiday pay was raised was in October 2018 when on 8 October 2018 Mr Beck wrote to RLC.

[12] Mr Brown was instructed for RLC and he provided some information on 26 October 2018 in the form of an analysis of holidays taken and owed throughout the employment since 2007.

[13] The statement of problem was then lodged on 30 October 2018.

[14] Six years prior to that date when information was required to be entered to the holiday and leave record was October 2012. Records are required to be kept from that date.

Did RLC keep records and if so on what basis?

Mr Saunders anniversary date

[15] The records provided by RLC support that the date Mr Saunders commenced employment was not March 2005 as Mr Saunders said in his evidence but 11 December 2005. I accept that that 11 December is the anniversary date for Mr Saunders.

Records available to the Authority

[16] In assessing holiday pay the Authority has had regard to a number of documents.

[17] There is the assessment by RLC of what leave it considered Mr Saunders had taken and been paid for since 2007 provided to Mr Beck on 26 October 2018. That focused mainly on the closedown period each year. The analysis provided showed 136.5 days of holidays were owed and 141.44 days were paid. RLC provided an alternative method of calculation to show that the amount of holiday pay calculated at 8% of gross income from 1 January 2007 was \$43,017.05 gross and the total holiday pay paid was \$40,116.30 leaving a shortfall of \$2,900.75. The holiday pay paid on termination was \$9,169.12 gross, comprising 15.611 days and a percentage for the final year when employment terminated before a further entitlement to annual holidays arose.

[18] In her evidence Ms Ellis said that the information used to compile that assessment was taken from the MYOB Ace Payroll but that information was not provided to the Authority before the investigation meeting. The Authority was also provided with a salary payment report from 11 December 2005 to 2013. There was also an incomplete and somewhat confusing document headed "leave paid report" for Mr Saunders 1 April 2005 to 31 October 2013. There were some timesheets for 2009, one for 2011 and a fuller set for 2012 completed by Mr Saunders.

[19] It became clear during the investigation meeting that a considerable amount of further information for the investigation into holiday pay was required. Subsequently the Authority was provided with a MYOB Ace Payroll report that showed an estimate of leave liability for each employee in RLC from 31 March 2006 and for each year thereafter to 31 March 2013. I was also provided with timesheets for 2013 together with payslips. There was also another analysis carried out by RLC on the holidays taken and paid from December 2005.

[20] The Authority was required to consider a variety of sources because no single holiday and leave record shows all the dates on which Mr Saunders took annual leave before 2013. Ms Ellis said that the leave was recorded and paid on the basis of what was filled in on the timesheets and there were difficulties getting Mr Saunders to fill out timesheets.

[21] In 2013 there are payslips that record Mr Saunders was paid holiday pay and those, in conjunction with the timesheet entries and the MYOB Ace payroll, provide an adequate record for that year of what leave was taken and paid for. Under s 81(3) of the HA the information for holiday and leave may also be kept in a form that allows it to be easily accessed and converted into a written form. For this year I am satisfied that it was.

[22] For the period between October 2012 and 1 January 2013 the holiday and leave record was required to be kept and the records for that period did not meet the requirements of s 81 (2) of the HA.

[23] I record that it is the responsibility of the employer to retain a holiday and leave record. Mr Saunders was a working director of RLC and one of two directors. Russell Lilley was the other director. Any responsibility for a failure to keep proper records could fall to the directors of a company. Mr Saunders said he had not been a director previously and put a lot

of trust in Russell Lilley, the other director at the time, who told him that he should be “on the tools” and to leave the operations of the company to him.

If there are no records, or the records are incomplete, then what is the approach under the Holiday’s Act?

[24] Assistance is obtained from the Employment Court judgment in *Hatcher* about the approach to be taken by the Authority where there has been a failure to keep a holiday and leave record.² It was stated in *Hatcher* that where an employer fails to keep a holiday and leave record or provide access to one, and this prevents an employee from bringing an accurate claim, then the Authority may make a finding to that effect.³

[25] If a finding is made of that nature then s 83(4) of the HA provides that the Authority may accept as proved, in the absence of evidence to the contrary, statements made by the employee about holiday pay or leave actually paid or taken by the employee. It was noted in *Hatcher* that it remains open to the employer to submit evidence that would counter the statement made by the employee. Further, the word “may” in s 83(4) of the HA means that it remains open to the Authority not to accept the employee’s statements but something more than a mere concern about imperfections would be required. An example was given where the Authority of Court may find the employee’s statements are simply not credible.⁴

Is Mr Saunders owed holiday pay and if so how much?

What does Mr Saunders say that he is owed?

[26] Mr Brown asked for information about Mr Saunders’ claim at an early stage. It was only on the morning of the investigation meeting that Mr Saunders provided a record of the leave that he could recall taking and what he felt he was still owed. Mr Saunders record of what he believes is owed for holiday pay is attached to the final page of this determination. Mr Saunders claims that he is owed \$34,650 for holiday pay being 99 days leave that he did not take. It would have been very difficult for Mr Saunders to recall his leave over such a historical period.

² Above n 1

³ Above n1 at [21] with reference to Section 83 (3) of the Holidays Act 2003

⁴ Above n1 at [22] with reference to s 83(3) of the Holidays Act 2003

[27] Mr Saunders did agree that what he actually received on termination was \$9,169.12 gross for holiday pay which should be deducted from this sum.

[28] He also agreed that because he had not completed 12 months of continuous employment until 11 December 2006 he did not become entitled to 3 weeks paid annual holidays until that time.⁵ That therefore would result in a further 15 days being deducted as well from the 99 days. Mr Saunders agreed that he spent five days in Rarotonga rather than three in 2012.

[29] I finally note in 2013 Mr Saunders assessed his entitlement at 20 days however his employment terminated before his anniversary date. The calculation therefore to be applied under s 25 of the HA for that year is 8% of the employees gross earnings since the employee last became entitled to the annual holidays, less any amount paid to the employee for holidays taken in advance.

What is the onus on Mr Saunders with respect to proving his claim?

[30] I do not find that RLC has breached its obligations under s 81 or 82 before October 2012 to keep or provide access to its holiday and leave records. Section 83 does not come into play for that period.

[31] I have found adequate records were kept in 2013 and that leaves only a short period from October 2012 where the records were not in compliance with s 81 of the HA. Unusually I could not be satisfied that for that short time Mr Saunders was prevented from bringing an accurate claim so as to bring s 83 of the HA into play. He could recall a period of overseas leave in October 2012 and his timesheets reflected a day's leave on the day before Canterbury Anniversary Day which he also recalled. Although he could not recall taking leave over the Christmas close-down his timesheet payslips are available and show some leave for the week ending 30 December 2013.

[32] Mr Saunders can still proceed with his claim but the onus rests on him to prove he is owed holiday pay on the balance of probabilities.

⁵ In April 2007 to four week annual holidays

Closedown

[33] It became apparent during the Authority investigation that, whether or not Mr Saunders worked over the RLC closedown period, from the working day before Christmas until the second week of January, would have a significant impact on whether he is owed holiday pay.⁶ That is because he had not counted any days leave over the closedown period when assessing how much he was owed.

[34] Mr Saunders said in his evidence that he always worked on the days between the statutory holidays and over the closedown in January and took five days holiday later in January. When asked how RLC would know that he worked over closedown he said that he told Mr Lilley. Mr Lilley did not accept that he was aware of Mr Saunders working over closedown and knew nothing about that. He said that it raised some health and safety issues for him if Mr Saunders had been working alone. Mr Saunders said that there was work he could and did do alone.

[35] The closedown would have amounted to about 11 days each year with the working day before Christmas and the three days between the statutory holidays of Christmas and New Year and a further two days after the New Year statutory days followed by another week in January.

[36] There are no timesheets for Mr Saunders available to the Authority before 2009 to provide guidance as to what work Mr Saunders undertook over the closedown period.

[37] For 2009 the first timesheet available as completed by Mr Saunders was provided is for the week ending 25 January 2009. In its assessment for that year RLC has taken into account the closedown to 9 January 2009. Mr Saunders agrees that he took about five days each year later in January for a family holiday. RCL in its analysis of annual leave has recorded those five days leave from 19 January 2009 to 23 January 2009.

[38] The absence of timesheets for 2009 around the close down period could support that in fact Mr Saunders did not work over the close down period or that time sheets were mislaid as there are considerable gaps in the timesheets provided over that whole year.

⁶ Closedown period under ss 29 -34 of the Holidays Act 2003

[39] There were no timesheets provided for 2010.

[40] There was only one time sheet provided for 2011. It was for a period after the close down which finished that year on 7 January 2011. Mr Saunders has headed the timesheet up for the week ending 12 January 2011 but I find that is more likely a mistake because the other weekly timesheets show the week ends on a Sunday. 12 January 2011 was a Wednesday. The time sheet reflects that Mr Saunders was away on Monday 10 January 2011

[41] He worked for the remaining four days. The RLC analysis has Mr Saunders taking leave for that week incorrectly for five days instead of only one although I am unclear, as there are no records for that period, how those days were actually treated at the time. The MYOB Ace Payroll report, for example, shows Mr Saunders is owed 23.03 days as at 31 March 2011.

[42] The only timesheet that could provide some insight into what happened over the close down was that provided in 2012. It is the last timesheet for that year for the week ending 23 December 2012. On the timesheet at the bottom Mr Saunders records 4 hours work on 28 December and 2 hours work on 31 December 2012. He had not recorded any hours worked for 24 or 27 December 2012 so there are two days leave for those days. A pay slip that was provided after the investigation meeting for 30 December 2012 for Mr Saunders shows 3 holidays at that time. They would have been for 24, 27 and 28 December 2012. In fact Mr Saunders took half a day's leave only on the last of those dates so the record should have shown two and a half days of leave rather than three.

[43] That timesheet, although showing some work was undertaken, is not consistent with Mr Saunders claim that he worked all of the days between the statutory days.

[44] In 2013 Mr Saunders' payslips record 3 days leave for the period ending 6 January 2013 and that would include the days between Christmas and New Year. Mr Saunders worked 0.2 of a day on 31 December so the leave record should have reflected 0.8 day's leave for 31 December instead of a full day's leave. The payslip on 13 January shows 5 days holiday for the close down for that week and then a further 4 days for the week ending 20 January 2013 when Mr Saunders took his usual family holiday.

[45] For 2013 Mr Saunders is shown as having taken 18.33 days leave for that year. Aside from the closedown, for which there are no timesheets after 31 December until 9 February 2013, the balance of leave is consistent with what is shown on his time sheets.

[46] There is no dispute that Mr Saunders was regarded as a hard worker. Mr Lilley described him as the “best Chippie he has ever seen.” However the only timesheet that records any work by Mr Saunders over this period is one from December 2012 that shows limited work on two part days between the statutory Christmas and New Year holiday. There are no other records to establish work over the closedown period and no other employee was present to confirm that work was carried out. The payslip records in 2013 support that there was leave taken over closedown.

[47] In order for Mr Saunders to satisfy the Authority, on the balance of probabilities, that he is owed holiday pay he must provide sufficient evidence. I accept the difficulties for him in doing so because of the historical nature of his claim. Having assessed the evidence carefully however I cannot be satisfied on the balance of probabilities that Mr Saunders worked over the closedown period every year and took no leave. There is no evidence to establish that. Indeed some evidence from the records that were available supports that it was more likely than not that he did take leave over the closedown.

[48] Leave taken over the closedown period impacts significantly on what Mr Saunders is owed for holiday pay, even taking a conservative approach to what that leave may have been.

Conclusions about holiday pay

[49] There were some limited errors in its assessment of holiday pay carried out by RLC as I have set out above and there may well have been others throughout the years. The evidence however supports that Mr Saunders claim is inconsistent with what leave was actually taken and is considerably overstated.

[50] For 2013 the records show Mr Saunders took 18.33 leave days and not the 6 that he records.⁷ For 2012 he took over 20 days if the closedown is included. For 2011 there is no evidence to support that he worked over the closedown and about 11 days would have to be

⁷ An adjustment of .2 of a day is required.

added to the 7 leave days he has recorded. Similar reasoning would apply for the other years back to 2006. I accept that Mr Saunders may have felt aggrieved that Mr Lilley took more holidays than he did. The Authority's focus is on whether Mr Saunders had his entitlement under the HA. Any disparity between the directors is a matter for them to discuss and resolve.

[51] The MYOB leave report which sets out leave as at the end of the financial year for each employee at RLC shows Mr Saunders had 6.21 days owing as at 31 March 2013. Ms Ellis paid a sum on termination that she felt was fair to Mr Saunders of 15.611 days holiday and the required percentage for 2013 as the anniversary date had not been reached.

[52] I am not satisfied that Mr Saunders has discharged the burden of proof on the balance of probabilities so as to find that a greater sum than was paid to him on termination is owing to him for holiday pay.

[53] He does not succeed in his claim for holiday pay.

Public Holiday claims

[54] Mr Saunders did not set out specifically what his claim for public holidays was until the morning of the investigation meeting. He said the claim was for 10 public holidays. He said that he worked Labour Day, Waitangi Day, Anzac Day and Queens Birthday each year. He referred to "popping in and doing jobs" and that earlier on he would work on sites.

[55] Mr Lilley said that on public holidays he never saw Mr Saunders in the office and that there was no expectation that he work on a public holiday. Ms Ellis said in her evidence there was a policy to not work public holidays. Mr Saunders did not have a written employment agreement for much of his employment. He was asked in or about February 2013 to sign a written employment agreement for the first time. He did not want to because of the restrictive covenants. It was therefore never signed. The agreement did provide for a requirement to work public holidays.

[56] I accept that Mr Saunders from his timesheets for 2012 and 2013 worked on some public holidays. There is no evidence for earlier years.

[57] Section 46 of the HA provides for an entitlement to public holidays. Section 47 addresses when an employer may require an employee to work on a public holiday. It provides that an employer may require an employee to work on a public holiday if the day falls on a day that would otherwise be a working day for the employee and the employee is required to work on the public holiday under the employment agreement. The balance of the sections in the HA addressing payments for working public holidays and alternative days is premised on the basis that an employee works in accordance with his or her employment agreement on a public holiday.

[58] Therefore the first issue for the Authority is whether Mr Saunders was required to work on a public holiday under his employment agreement. Mr Saunders' evidence was not to the effect that he was required to work on any of the public holidays which his timesheets disclosed he did work. Rather as both a director and salaried employee he decided to undertake some work on those days because he felt there was some work to do. In so doing Mr Saunders had a choice that someone who works, for example, in a café or another role where they are rostered to work on a public holiday does not have.

[59] I accept that the employment agreement provided to him in 2013 specified a requirement to work on public holidays. In that year Mr Saunders did not work on Waitangi Day. He did undertake work on Anzac Day as he did in 2012. He did not work on Queens Birthday and I understand the employment relationship ended before Labour Day.

[60] I am not satisfied that Mr Saunders was required under his employment agreement to work on public holidays before 2013. In 2013 he did not sign an employment agreement that may have required him to work on public holidays. There is no evidence in that year that he was required to work the public holiday he did work.

[61] As a result I am not satisfied that a claim for payment for working on a public holiday is made out and that there should be payment for working on the public holidays that he did under s 50 of the HA and/or that he should receive an alternative day under s 56 of the HA.

[62] The claim for public holiday payments is not made out.

Costs

The shareholders agreement

[63] Mr Brown accepts, I find appropriately, that in all likelihood the Authority does not have jurisdiction with respect to the shareholders discharge agreement. I find that the Authority does not have jurisdiction. The agreement has its own dispute provision in clause 16 or it may fall to the civil jurisdiction to resolve.

[64] Out of an abundance of caution I will reserve costs.

Helen Doyle
Member of the Employment Relations Authority

