

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 234/08
5092822

BETWEEN ALAN WENZL SCHOLLUM
Applicant

AND ORANGEWOOD LIMITED
Respondent

Member of Authority: Marija Urlich
Representatives: Bryce Quarrie, for Applicant
Nikki Dines, for Respondent
Investigation Meeting: 19 May 2008
Further information and Submissions received: 23, 27 May, 3, 18 and 23 June 2008
Determination: 7 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Schollum was employed by Orangewood Limited as Operations Manager from December 2003 until he resigned in October 2006. He says he had an agreement with Orangewood that all hours worked in excess of 2250 per annum would be fully reimbursed on resignation as paid time in lieu. He seeks to be reimbursed for time worked in excess of his contracted hours during 2004, 2005 and 2006.

[2] Orangewood says the employment agreement is clear; that as a salaried employee Mr Schollum was required to work the hours necessary to complete his duties and hours in excess of 2250 per annum were to be worked by mutual agreement. It says there was no agreement to reimburse hours worked in excess of 2250 as paid time in lieu.

[3] There are two matters to determine:

- (i) whether it was a term of Mr Schollum's employment agreement with Orangewood that he would receive paid time in lieu for hours worked in excess of 2250 per annum; or
- (ii) if there was no such term, whether Mr Schollum is entitled to be paid for hours worked in excess of 2250 per annum.

Terms of employment

[4] Mr Schollum executed a written employment agreement with Orangewood on 28 November 2003. The relevant terms of the agreement are:

1. *Application*

- a) *This agreement replaces any previous agreement, understanding or arrangement between parties, whether written or verbal, expressed or implied, prior to the date of application of this agreement.*
- b) *Nothing in this agreement shall prevent the parties agreeing in writing to vary any or all provisions contained in this agreement.*
- c) *This agreement will be reviewed annually.*

...

4. *Hours of work*

- a) *The hours of work will be those necessary to achieve the requirements of the position and generally meet business needs. Employees expected to be available during standard business hours or as otherwise requested by your Manager (who recognises your family and social commitments).*
- b) *Actual hours worked will be agreed with the employee from time to time, but will be subject to an annual maximum as specified in Schedule A.*

...

10. *Salary*

- a) *Remuneration shall be in accordance with Schedule A. This salary is deemed to cover payment for the overall performance of the duties.*
- b) *Salaries are reviewed annually on or around the 31 January each year, to ensure they remain fair in terms of the employee's contribution, the employee's performance, the requirements of the position, and the employer's ability to pay.*

...

25. *Variation*

The terms and conditions contained herein may be varied by agreement in writing between the employer and employee.

...
26. *Declaration*

I, (full name) Declare that I have read and understood this Employment Agreement and accept all conditions fully.

I further declare that I have read (or had explained to me to my satisfaction) the House Rules and accept them.

Schedule A

...
2. *Salary*

The employee will receive an annual salary of \$65,000 per annum. This salary includes payment for all hours worked.

...
3. *Maximum annual hours*

The employee will not be expected to work more than 2250 hours in each 12 month period, unless by mutual agreement this provision is exceeded.

[5] Excessive hours of work was an issue for employees at Fruitgrowers. Orangewood was aware of this and took steps to contain those hours by setting a maximum number of hours and stipulating a mechanism for hours worked beyond that maximum ie, any hours worked beyond that point would be worked by agreement.

[6] In late November 2003, and prior to Orangewood taking over the business, Barry Milne, a director of Orangewood, and a fellow director, Brian Flowers, addressed a meeting of key staff which included Mr Schollum. The purpose of the meeting was to keep key staff informed and secure their employment with the new owner. Mr Milne and Mr Flowers had been directors of Fruitgrowers and were now directors in the purchasing company, Orangewood. At this meeting Mr Milne said he discussed the new employment agreement staff would be offered and in particular that there would be no time in lieu in the new contracts.

[7] Mr Milne then met individually with staff to discuss and resolve any outstanding issues. During his meeting with Mr Schollum they discussed how Mr Schollum's time in lieu entitlement could be taken if the new company was taking over the business on 1 December 2003. Mr Milne and Mr Schollum negotiated a pay out of Mr Schollum's Fruitgrowers time in lieu entitlement.

[8] Mr Schollum confirmed to the Authority the negotiated payment represented approximately 50% of his outstanding Fruitgrowers time in lieu entitlement.

[9] In his witness statement Mr Schollum described the alleged time in lieu arrangement and how it was agreed with Orangewood:

On the 1st December 2003 Orangewood Fruitgrowers Ltd was purchased by a new company Orangewood Ltd. All staff were reimbursed in full for hours worked up to this date. Len Hodge was appointed to General Manager. Tony Smitheram and I were particularly concerned with the time necessary to achieve the requirements of the job. We were assured that changes were proposed in the near future and that until such time our "time in lieu" agreement would continue for all hours worked in excess of 2250 per annum. I signed a new employment agreement with Orangewood Ltd only after lengthy discussions and assurance on this with Len.

[10] Mr Schollum executed the Orangewood employment agreement on 28 November 2003. He met with Len Hodge for this purpose. Mr Hodge executed the document on behalf of Orangewood. Mr Schollum said that during the execution of the document they discussed and agreed that Mr Schollum would receive time in lieu for hours worked in excess of 2250. Mr Schollum said no record of this term was made because he trusted Mr Hodge. This is to be contrasted with a hand written amendment to the employment agreement about mobile telephone charges which was made at the time the document was executed.

[11] Mr Schollum accepted that when he signed the written employment agreement he knew the new company would not pay time in lieu.

[12] Len Hodge's written evidence to the Authority includes:

On 1 December 2003 the assets of Orangewood Fruitgrowers Limited were purchased by a new company called Orangewood Limited, and it was at that time I became General Manager. Additionally, at that time, new employment contracts were prepared for the staff including Alan Schollum.

There was an understanding at that time that if extra hours over and above 2250 per annum were necessary they would be reimbursed as had happened previously (time in lieu).

Following the 2004 season I called a staff meeting with Alan, [and other named staff] to discuss the feasibility of introducing a planned Production Bonus system that would apply to staff members keeping their hours within the 2250 hours per annum previously mentioned. I had been keeping a weekly record of hours worked for all key staff and this was also reported at our weekly meetings.

I unfortunately had my computer flooded and subsequently lost the records I had of both those contracts and the key staff hourly record.

[13] Mr Hodge said, in oral evidence to the Authority, his view was that Mr Schollum was entitled to be paid for the hours worked in excess of 2250 per annum because of the employment agreement and the hours he had worked. Mr Hodge said, though he could not recall the specific details of the discussion with Mr Schollum, that when he and Mr Schollum executed the employment agreement his predominant feeling was the situation was not changing. When it was put to Mr Hodge that the Orangewood written employment agreement and the Fruitgrowers' employment agreement did not provide for the payment of time in lieu he expressed surprise.

[14] The evidence falls short of establishing that it was a term of Mr Schollum's employment agreement that he could accumulate and be paid out time in lieu for hours worked in excess of 2250 per annum. There is no record of any such agreement. Mr Schollum and Mr Hodge's evidence to the Authority was not clear that an agreement as to the asserted term was reached on 28 November 2003. Their subsequent conduct does not support the existence of the asserted term; the contingent liability of accumulating lieu time was not a budget item, it was not reported to the board of directors and it was not raised until Mr Schollum resigned some three years later..

Reasonable remuneration

[15] There is no dispute that during his employment with Orangewood Mr Schollum worked hours far in excess of 2250 during each calendar year. Mr Schollum's diaries show he reached the contractual maximum hours by half way through the year. Prior to his resignation Mr Schollum did not seek to negotiate payment for hours worked in excess of 2250. He did not seek to take time in lieu.

[16] I have considered the submissions filed by counsel, at my request, on the issue of reasonable remuneration, as discussed in *Lamont v Power Beat International Limited* [1998] 2 ERNZ 20. In that case the Employment Court cited the following passage from Halsbury's *Laws of England*, 4th Ed, Vol 16, para 19:

If a person is led by his employer to believe that he has been appointed to a position and he acts in that capacity, it is for the employer to show that his services were not to be remunerated. Where it is agreed that it shall be left to the employer's discretion to determine whether or not remuneration is to be paid for any particular services, and he decides against making any payment, no remuneration is recoverable. If, however, under a contract of employment the amount of an employee's remuneration is left to be fixed by agreement or to be decided by the employer, but it is nevertheless clear that some remuneration is intended to be paid, the employee is entitled, if the employer refuses to make any payment, to recover reasonable remuneration on an implied contract to pay him a quantum meruit. In determining what is reasonable remuneration the court may take into account any communications between the parties on the subject of remuneration as evidence of the value which each puts upon the services in question.

[17] The Court went on to cite the following passage from Chitty on Contract:

The circumstances must clearly show that the work is not to be done gratuitously before the court will, in the absence of an express contract, infer that there is a valid contract with an implied term that a reasonable remuneration would be paid; this principle may extend to services performed in anticipation that negotiations will lead to the conclusion of a contract, provided that services were requested or acquiesced in by the recipient. (29-127)

[18] Mr Quarry submitted that Mr Schollum worked in excess of 2250 hours per annum under the belief he would be remunerated and that that belief was reasonably held. Mr Schollum and Orangewood expressly agreed Mr Schollum would receive a salary of \$65,000 per annum for *all hours worked*. They also agreed that the maximum hours worked in a 12 month period would not exceed 2250 without *mutual agreement*. There was no discussion between Mr Schollum and Orangewood to vary the maximum agreed hours. There was no discussion during the term of employment that that salary was inadequate for the hours worked. Mr Schollum did not seek to enforce the 2250 hour maximum by, for example, refusing to work hours over that maximum or seeking to negotiate payment for hours worked over that maximum.

[19] On the clear words of the agreement the hours worked in excess of 2250 were not worked gratuitously. The salary negotiated by the parties extends to work performed by Mr Schollum in excess of 2250 per annum because the parties agreed that salary would be paid for *all hours worked* and there is no evidence the hours worked in excess of 2250 per annum were not worked by mutual agreement.

Determination

[20] For the above reasons I find that it was not a term of Mr Schollum's employment agreement with Orangewood that he would be paid time in lieu. I also find that the employment agreement fixed his remuneration for all hours worked and that those hours were worked by mutual agreement.

Costs

[21] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to reach agreement then Ms Dines should file and serve costs memorandum within 28 days of the date of this determination. Mr Quarrie has a further 14 days to file and serve a memorandum in response.

Marija Urlich

Member of the Employment Relations Authority