

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 421
5450489

BETWEEN DARREN ROBERT ABBOT
Applicant

A N D ALLES VERLORE LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: F Meikleham, Counsel for the Applicant
K Sass, Advocate for the Respondent

Investigation Meeting: 11 and 22 September 2014 at Tauranga

Submissions Received: 4 and 22 September 2014 from the Applicant
17 and 22 September 2014 from the Respondent

Date of Determination: 13 October 2014

DETERMINATION OF THE AUTHORITY

- A. Darren Abbot's wage arrears claim for accrued annual leave entitlements from 4 August 2004 to 2 February 2012 is within the six year time limitation pursuant to s142 of the Employment Relations Act 2000.**
- B. At the end of his employment, Darren Abbot was entitled to annual leave of \$3,222 less any anticipated annual leave taken of \$4,288.33. This left a negative balance of \$1,066.33 of anticipated annual leave owed to the respondent. In the circumstances there are no wage arrears owed to Darren Abbot. The wage arrears application is dismissed.**
- C. There are no costs because the respondent was self-represented.**



Employment relationship problem

[1] Darren Abbot was employed by the respondent company, Alles Verlores Limited, until it ceased trading on or about 2 February 2012. Mr Abbot seeks to recover wage arrears for annual leave owed at the end of his employment of \$12,915.

Time limitation

[2] There was a preliminary issue whether Mr Abbot was prevented from filing an application to recover wage arrears owed more than six years prior to the date of filing by s.142 of the Employment Relations Act 2000 (the Act).

[3] Section 142 prohibits actions being commenced in the Authority for claims such as wage arrears "*more than 6 years after the date on which the cause of action arose.*" The period for recovery of wage arrears spans 4 August 2004 to 2 February 2012.

[4] Annual holidays must be taken by agreement between the employer and employee (s.18(3) of the Holidays Act). Section 27 of that Act provides that payment of any accrued annual holidays must be made when "*the employee's employment has come to an end*" (s.27). The Courts have held the day annual leave entitlements become due and owing could be the workers last day of work.¹ Therefore the cause of action for recovery of wage arrears arose on the last day of Mr Abbot's employment being 2 February 2012. The Statement of Problem was filed on 3 March 2014. He has commenced his action within 6 years of the date the cause of action arose.

[5] Therefore Darren Abbot's wage arrears claim for accrued annual leave entitlements from 4 August 2004 to 2 February 2012 is within the six year time limitation pursuant to s142 of the Employment Relations Act 2000.

Facts leading to dispute

[6] As is becoming all too familiar in this jurisdiction, this matter involves a family owned company employing a family member. In 2004 the respondent company was purchased by the applicant's former parents in law, Katherine and Michael Sass. Fifty percent of the shares in the respondent company were transferred in equal shares to Darren Abbot (Darren) and his former wife, Tracey Abbot (Tracey).

¹ *Burns v Radio Pacific Ltd* [1998] 3 ERNZ 559; *Napier Aero Club Inc v Tayler* [1998] 1 ERNZ 241 (EmpC) at 243



At the time of its purchase the company was known as Bay Pallets Limited. It subsequently changed its name to Alles Verlore Limited.

[7] The respondent operated a business selling custom built pallets to various horticultural and other businesses.

[8] On 4 August 2004 Darren was employed as the Factory Manager. His job included sales, marketing and administration including wages. He was responsible for managing his own annual leave.

[9] On 6 September 2011 Tracey and Darren separated.

[10] On or about 2 February 2012 the respondent sold its pallet business. As part of the sale, Darren was employed by the new owner.

[11] On 29 January 2013 Darren emailed Katherine Sass (Kathy) alleging he was owed \$2,951.47 in accrued annual leave.

[12] On or about 31 January 2014 Darren emailed Kathy again following an unsuccessful mediation. He demanded payment of \$27,903.12 for accrued annual leave and attached a Smart Pay Roll record. Darren had been managing wages and leave through the Smart Pay Roll electronic wages and leave record system at the end of his employment. Kathy replied denying any liability and raised the respondent's insolvency.

[13] On 3 March 2014 Darren filed a statement of problem in the Authority attaching the Smart Pay record and seeking to recover his leave balance of \$27,903.12.

[14] This matter was set down for hearing on 11 September 2014 in Tauranga. Unfortunately the matter was not ready to proceed to hearing. It was adjourned for a 1 day hearing on 22 September 2014 which was not completed until 8 pm that evening. It is now before me for determination.

Issues

[15] There is a single issue for determination, namely what accrued annual leave entitlements (if any) were owed to Mr Abbot by the respondent company?



What did the parties agree was Darren Abbot's annual leave?

[16] The parties accept there was no signed employment agreement. Mr Abbot submitted there was an agreement his annual leave be on the same terms as his previous employment agreement with Woolworths Gull Rotorua, namely four weeks. The respondent denied any agreement around leave. It accepted the only agreement reached was Mr Abbot's salary of \$52,000 per annum. The respondent assumed his annual leave would be no less than the statutory minimum of three weeks to 1 April 2007 then four weeks thereafter.

[17] To create an employment contract there must be a common intention of the parties to enter into legal obligations. Whether a "common intention" can be read into an arrangement between the parties is to be determined in the evidence of their respective statements and/or actions at the time of, or before, or after that arrangement is made.²

[18] I must examine the terms and conditions of the contract and the way in which it actually operated in practice.³ When the intention of the parties has to be gathered partly from documents but also from oral exchanges and conduct, the terms of the contract are questions of fact.⁴ Intention can also be derived from parties' statements at the time the employment contract was allegedly made and if not clear, from their subsequent conduct and dealings.⁵

[19] I am not satisfied, based on the evidence before me, that there was agreement to four weeks annual leave. There was no evidence of a common intention for Mr Abbot to have four weeks annual leave at the start of his employment. The parties accept they discussed Mr Abbot's salary. Darren Abbot accepted at hearing there was no discussion about his leave other than a general reference to his employment being no less advantageous than what he had had at his previous job. He did not provide the respondent or the Authority with a copy of his previous employment contract. In short, the respondent would have had no idea what his previous terms were other than the salary discussed.

² *Inspector of Awards and Agreements v Religious Society of Friends (Quakers) Wellington Monthly Meeting* [1984] ACJ 409

³ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32]

⁴ See above at [20]

⁵ *Page v Waipu Citizens and Services Club Inc*, unreported, AEC 1/98



[20] Mr Abbot also stated his entitlement to leave would not arise until he had completed 12 months continuous employment. This is consistent with s.16(1) Holidays Act 2003 which provides for annual leave to accrue at “*the end of each completed 12 months of continuous employment.*”

[21] In the absence of any agreed term about annual leave, the Holidays Act 2003 applied. Darren Abbot’s annual leave for the period 4 August 2004 to 1 April 2007 would have been three weeks, rising to four weeks thereafter.

Wage arrears

[22] This is an application for payment of wage arrears pursuant to s131 of the Act. Both parties accept the wages and leave record known as Smart Pay Roll is inaccurate. Where there is a failure to keep an accurate record, s132 applies:

132 Failure to keep or produce records

(1) *Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—*

- (a) *the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and*
- (b) *that failure prejudiced the employee's ability to bring an accurate claim under section 131.*

(2) *Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—*

- (a) *the wages actually paid to the employee;*
 - (b) *the hours, days, and time worked by the employee.*
- (3) *A defendant may not use as evidence any wages and time record that would be inadmissible under section 232(3).*

[23] The Court has held s132 does not mean that the Authority “*must accept as proved statements made by the employee about the wages actually paid to the employee and about the hours, days, and time worked by the employee.*”⁶

⁶

Rainbow Falls Organic Farm Ltd v Rockell [2014] NZEmpC 136 at [29]



[24] Given the absence of any leave record, the evidence supporting the actual leave taken has to be drawn from secondary materials such as diaries and bank statements and an assessment of the parties oral evidence at hearing.

[25] There is a substantial conflict of evidence between the parties. This requires express findings of credibility⁷ upon evidence given by sworn statements and orally at hearing.

[26] Credibility can be assessed on two bases – the witness personally⁸ and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour⁹;
- (b) Inconsistencies and contradictions of all kinds¹⁰;
- (c) Prevarication¹¹;
- (d) Reasons to lie¹²
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence¹³.

[27] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?¹⁴

[28] I may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that

⁷ *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

⁸ *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69

⁹ *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

¹⁰ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

¹¹ *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

¹² See above at [109]

¹³ See above at [110]

¹⁴ See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10



seems capable of being taken into account as indicating the probabilities of the situation.¹⁵

[29] I was not persuaded by Darren's evidence about his hours of work and leave taken. Darren was both a part owner and employee of the respondent company with sole responsibility for managing his own leave. None of his fellow shareholders or directors sought to question his management. This is not surprising given this was a family owned company. They would have trusted him to keep accurate leave records and to take annual leave to ensure no debt accrued.

[30] I have sighted papers showing a signed consent from Mr Abbot to be appointed as a director of the respondent. It appears he may have been registered with the Companies Office as a director until 31 January 2013. At that stage, it appears he wrote to the Companies Office denying that he had given any such consent to be a director. It was also around the time he raised his wage arrears claims with the respondent. Although he alleged some fraudulent action by the Sass', he did not deny signing the directors consent form. He merely pointed to its incorrect address. The fact he was a director at one stage emphasises the close relationship he had with the running of the company.

[31] Darren Abbot's evidence was also contradictory and at times falsely overstated his annual leave entitlement. For example, Mr Abbot claimed he was owed \$27,903.12 in an email dated on or about 31 January 2014 and again in his Statement of Problem. He admitted at the hearing he knew he was not entitled to that amount because of a mistake he made with the Smart Pay Roll system. He had loaded his annual leave entitlement as 8% of his total earnings. This was at a time when he was well aware he had taken leave but not recorded it.

[32] In an email dated 29 January 2013 to Kathy Sass he only sought payment of \$2,951.47 for annual leave. His explanation for the inconsistency was \$2,951.47 was owed for one year. This was unconvincing. He did not specify which year this amount pertained to. The email also referred to him having worked out the annual leave owed from the Smart Pay Roll system, but he produced no documents to support his claims.

¹⁵ *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603



[33] Darren filed a signed statement with the Authority on or about 14 August 2014 stating he was owed \$10,395 for the period 3 March 2008 to 1 February 2012. He has now filed a schedule seeking payment of annual leave totalling \$12,915 for the period 4 August 2004 to 2 February 2012. His previous statement cannot be reconciled with the Schedule or his oral evidence at hearing. Darren's explanation for these inconsistencies was as the evidence has come in, he was able to be more specific about his claims. Certainly when the respondent produced diaries and bank statements, Darren changed his evidence.

[34] I now turn to consider the evidence about the actual leave taken by Darren Abbot. Mr Abbot produced a schedule at hearing which showed the amounts of leave he accepts was taken and where he and the respondent disagreed. There were 63 days in dispute.

[35] Some of time claimed by the respondent as being taken as annual leave involved their children's sports and school activities or personal matters such as building their new home. These times appeared to be 1 to 2 hours at most. Darren also attended to work matters during actual annual leave. My impression of the evidence was of a "*quid pro quo*" arrangement where Darren would attend to work matters while on annual leave in exchange for attending to personal matters during work time. I have determined no deduction of annual leave should be made for these types of activities.

4 August 2004 to 2005

[36] Darren Abbot accepted at hearing he had taken 10 days leave. The respondent proposed he had taken much more.

[37] There was no documentary evidence to support either parties submissions about leave.

[38] Tracey Abbot gave evidence Darren spent most of Christmas with the family although she accepts he did go in and do the payroll and clear the mailbox. Kathy Sass supported her evidence. She recalled Darren being with the family during the Christmas Eve 2004 and referred to various family functions including Darren.

[39] Darren accepted the factory closed down on 23 December 2004 and he was on annual leave for 24 December only. As this was their first year of work, Mr Abbot



believed he worked through the Christmas period on last minute orders. Christmas and Boxing days would have been Mondayised due it falling on the weekend. Therefore the only working days would have been 29, 30 and 31 December.

[40] Mr Abbot referred to a rush order for a client but gave no detailed evidence of what that rush order was other than building pallets. He also referred to having to build pallets and stocking them just in case a client wished to have them. This seems illogical given the cost and possibility that a client may not require them. I have little details about the necessity for Darren to continue working through Christmas/New Year. He appears to have had a pattern in later years of closing the business to spend time with family. He was also due to take leave the following week.

[41] I accept it is more probable the company was closed during the December period and did not reopen until after Mr Abbot returned from Langkawi on 10 January. I determine a further three days of annual leave would have been taken by Mr Abbot for 29, 30 and 31 December 2004.

[42] I further determine Darren took 13 days annual leave. However at the time he was not entitled to any leave as his 12 month anniversary had not passed. Darren had taken 13 days of anticipated annual leave which must be deducted off any annual leave entitlement at the end of his employment.

August 2005 to 2006

[43] At hearing Mr Abbot accepted that 16 ½ days were taken. The respondent proposes he took a further 4 days shifting house. Darren states this was done mainly on weekends and with friends.

[44] The respondent claimed Darren took 4 days to coach his son's cricket team, attend swimming sports and a parent interview. I do not accept time should be taken off for that period. This is because of the quid pro quo arrangement I have referred to above. Darren accepted he spent a half day with a child at swimming sports on 10 March 2006. This is not annual leave because of the above arrangement. Accordingly he has taken only 16 days annual leave.

[45] Although I accept Tracey Abbot's evidence that there was some time spent moving house twice, I do not accept this involved four days annual leave. I accept



Darren's assertion most of the moving was completed on the weekends. In the circumstances, I only allow two days' annual leave in total.

[46] With the time I have allowed for the move I determine Darren Abbot used 18 days' annual leave. Given he had taken anticipated annual leave of 13 days, had accrued 15 days annual leave, he has a balance of anticipated annual leave of 16 days.

August 2006 to 2007

[47] At hearing Mr Abbot accepts he took 19 days' leave. During that period, his statutory holidays increased from three to four weeks.

[48] Several dates between 19 February 2007 and 28 March 2007 involved coaching his son's cricket team, children's swimming galas, triathlon's and parent teacher interviews. I make no adjustment for those matters. This is because of the quid pro quo arrangement I have referred to above.

[49] I accept Mr Abbot used 19 days annual leave. Given he had taken anticipated annual leave of 16 days, had accrued 20 days annual leave, he has a balance of anticipated annual leave of 15 days.

August 2007 to 2008

[50] At hearing Darren Abbot agreed he took 19.5 days' leave.

[51] I accept his submission that he did not take leave for various children's activities, sports days and a final assembly. There is a claim he took a few hours to meet with an engineer and a surveyor in December 2007. I treat those attendances as part of the quid pro quo arrangement above.

[52] A period of three days between 28 September and 2 October 2007 is disputed. Darren does not recall taking time off but notes this was a busy time for kiwifruit. Tracey Abbot says it was during school holidays and they definitely spent time together. She produced copies of her diaries showing the holiday marked out¹⁶ and gave details about activities including hot pools, MacDonalds and Video Ezi. I accept her evidence and determine a further three days of annual leave was taken during this period.

¹⁶ Common Bundle of Documents (CBD) pp37-38



[53] Between 14 and 18 July 2008, Mr Abbot agreed he took five days off for family time, but sought to claw back half a day given he worked on the payroll during this period. As stated above, this is quid pro quo for other times he takes personal family time for one or two hours without taking annual leave. Accordingly I determine that between 14 and 18 July 2008 Mr Abbot took five days' annual leave, not 4½ days. A further half day is to be deducted for annual leave taken.

[54] Adding these matters together, Mr Abbot took 23 days' annual leave. Given he had taken anticipated annual leave of 15 days, had accrued 20 days annual leave, he has a balance of anticipated annual leave of 18 days.

August 2008 to 2009

[55] Darren Abbot accepts he took 14 ½ days annual leave. The respondent proposes he took more.

[56] On 5 September 2008 the parties purchasing trees for landscaping at home. After hearing evidence regarding transportation and planting of the trees, I this involved one day of annual leave. An additional half day annual leave is to be deducted.

[57] I do not accept that time should be taken off for annual leave on 16 December 2008 for attending a child's assembly or on 26 March 2009 for attending the children's swimming sports. This falls within the quid pro quo arrangement above.

[58] The primary dispute is the amount of time taken off during Christmas/New year. Mr Abbot states he had returned to work. Tracey Abbot says she does not dispute that Mr Abbot went in and out to work but was otherwise with the family. She was adamant he was with the family because 6 January is their wedding anniversary and they always spent their wedding anniversary together, either at home or at Ohope.

[59] There is a record of a purchase on 5 January 2009 at Whitcoulls for \$34.50.¹⁷ Darren accepted that this purchase was for an anniversary present and was made using his bankcard. It did appear from the evidence at that time that the parties did value their wedding anniversary enough to purchase and exchange gifts. It is not improbable they would also take some time to spend together during that day at the

¹⁷ CBD p73



very least. There was no evidence Darren was required at work. The pattern of previous Christmases has been for him to spend time with family.

[60] A number of purchases on 7, 8 and 9 January were made on Darren's bankcard including at Countdown, Civic Video, Hull Road Bakery and the Cheesecake shop.¹⁸ These purchases appear non work related and more likely to be for the children. In the circumstances, I determine that Mr Abbot was with the family from 5 to 9 January 2009. A further five days' annual leave shall be deducted.

[61] Taking into account the above, I determine Darren Abbot took 20 days annual leave. Given he had taken anticipated annual leave of 18 days, had accrued 20 days annual leave, he has a balance of anticipated annual leave of 18 days.

August 2009 to 2010

[62] Mr Abbot accepted he took 15 ½ days leave.¹⁹ The respondent alleges he took more time off.

[63] There was disagreement whether Mr Abbot took a day off to attend a child's water polo tournament in Hamilton on 18 December 2009. Tracey Abbot referred me to the bank statements which show a purchase on Darren's card in Cambridge.²⁰ Although Darren proposed this could have been whilst dealing with client business, he provided no detail about this. I prefer Tracey's evidence. It was more likely if he was in Cambridge he was either going to or from his son's water polo tournament in Hamilton. Accordingly, a further one day annual leave is to be provided.

[64] The annual leave between 11 and 15 January 2010 involves a difference of half a day. Mr Abbot claims that half day for the purposes of him doing the payroll. As noted above, this is a quid pro quo issue and some allowance for him to undertake some work during his annual holiday should be given in return for his odd hours in which he would attend to personal business only. Accordingly a further half day of leave shall be deducted.

¹⁸ CBD p73-74

¹⁹ Brief of evidence D Abbot dated 16 September 2014 para 63 to 69

²⁰ CBD p91



[65] Accordingly the total amount of leave taken for this period was 17 days. Given he had taken anticipated annual leave of 18 days, had accrued 20 days annual leave, he has a balance of anticipated annual leave of 15 days.

August 2010 to 2011

[66] Mr Abbot accepted he took only 8 days leave. The respondent proposed he took a further 10 days leave.

[67] On 10 September 2010, the respondent alleges Darren took a half day with to go skiing with the Scouts. Tracey Abbot believes he may have gone into work in the morning but had spent half the day packing the car to go prior to leaving that evening. I decline to make any adjustment. This appears to fall within the quid pro quo agreement above.

[68] Tracey Abbot alleged she required Darren Abbot to care for the children as she was working between 20 and 31 December 2010. She says there was no holiday programme or alternative care available. Mr Abbot says that he was working.

[69] It appears more probable in the absence of any alternative child care arrangements that Darren Abbot did care for the children. He could manage his leave and time at work. Tracey Abbot worked as a real estate agent and December was one of their busiest selling periods. I prefer Tracey's evidence that Darren was on leave from 20 to 28 December 2010.

[70] I do not accept Mr Abbot was on annual leave for 28 to 31 December 2010. Tracey was working and the parties accept the children were on a scout jamboree camp. It is not improbable Darren would go into work in the circumstances.

[71] The 27th and 28th of December 2010 were Mondayised Christmas/Boxing days. Darren Abbot would have taken five annual leave days from 20 to 24 December 2010.

[72] Between 5 and 7 January 2011, Tracey Abbot claims Darren was at home with her. This is because they always spent their wedding anniversary together. She claims they spent time on 5 and 7 January 2011 with the children because they were due to go away on a cruise for some time without them. The bank statements for that



period show visits to Burger King, Pizza Hut, Baker's Delight, a cinema, restaurants and various other retail establishments. Both parties' cards are being used for payments²¹. It is my view that the bank statements are consistent with this couple spending time with their children between 5 and 7 January 2011. Accordingly, a further three days' annual leave shall be provided for this period.

[73] There was some discussion about the length of the cruise taken between 10 and 19 January 2011. Darren Abbot at hearing the cruise was eight days, not seven days as he had previously claimed. A further one day's annual leave shall be deducted.

[74] Accordingly Darren Abbot took 17 days annual leave. Given he had taken anticipated annual leave of 15 days, had accrued 20 days annual leave, he has a balance of anticipated annual leave of 12 days.

4 August 2011 to 2 February 2012

[75] For the period August 2011 and February 2012, both parties accept Mr Abbot took 7 days leave.

[76] Because his employment ended before the 12 month anniversary of his accrued annual leave, the value of any annual leave entitlement must be determined by 8 % of his gross earnings for the period 4 August 2011 to 2 February 2012 less any anticipated annual leave (s25 Holidays Act 2003).

[77] His gross earnings for the period 4 August 2011 to 2 February 2012 were \$40,275. 8 percent is \$3,222.

[78] He took anticipated annual leave for the period 4 August 2004 to 3 August 2011 of 12 days. The value of this anticipated leave must be at the rate of his ordinary weekly pay at the beginning of the annual holiday (s22 Holidays Act 2003). His ordinary weekly pay during the relevant period was \$1,000 or \$200 per day. 12 days equates to 2 weeks and 2 days or \$2,200.

[79] He took anticipated annual leave of 7 days for 4 August 2011 to 2 February 2012. His wages fluctuated for this period so the value of this annual leave must be based upon his average weekly pay for this period. The total gross pay was \$40,275

²¹ CBD p.89



divided by the period of 27 weeks gives the average weekly pay of \$1,491.67 or a daily rate of \$298.33. The 7 days taken is 1 week and 2 days or \$2,088.33. The total value of the anticipated annual leave to be deducted is \$4,288.33.

[80] I determine that at the end of his employment, Darren Abbot was entitled to annual leave of \$3,222 less any anticipated annual leave taken of \$4,288.33. This left a negative balance of \$1,066.33 of anticipated annual leave owed to the respondent. In the circumstances there are no wage arrears owed to Darren Abbot. The wage arrears application is dismissed.

[81] There are no costs because the respondent was self-represented.


T G Tetitaha
Member of the Employment Relations Authority

