

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 196
5404056

BETWEEN ADVENT MANAGEMENT
LIMITED
Applicant

A N D SARAH SMITH, A LABOUR
INSPECTOR OF THE
MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT (formerly the
Department of Labour)
Respondent

Member of Authority: P R Stapp

Representatives: Dr Dan Lohr for Applicant
Erin Spence for Respondent

Investigation Meeting: In person and by telephone
22 April 2013 at Tauranga 9.30-10.00am
23 April 2013 at Wellington 10.00-10.30am
On the papers

Date of Determination: 15 May 2013

DETERMINATION OF THE AUTHORITY

Objection to an improvement notice

[1] This is an objection from Advent Management Limited (Advent) to an improvement notice issued by a Labour Inspector.

[2] Advent is a registered company that has operated a medical clinic in Tauranga. One of its directors is Dr Dan Lohr. Advent claims that the improvement notice does not recognise that an agreement was reached with Carol Schoburgh, the person who has made a complaint about not receiving holiday pay with the Ministry of Business, Innovation and Employment (MBIE), and that she would take Fridays off.

[3] The respondent says that Ms Schoburgh's arrangement was that as she was paid by Advent while working at another clinic on a Friday, it was not fair that Advent had to pay her for those Fridays, or treat them as paid holidays, as arranged with her verbally. The employer's wage time and holiday record does not indicate any arrangement in regard to the taking of holidays in advance on Fridays, when she was paid for only the hours she worked and not Fridays. There was no holiday pay reconciliation done at the end of the employment to support the employer's claim.

[4] MBIE and Ms Schoburgh accept that she did take one day's holiday in the time that she was employed by Advent. The Labour Inspector has calculated that the amount of holiday pay owing (including a deduction for the one day that was taken as annual leave) is \$1,622.50 gross.

The facts

[5] An employee, Ms Schoburgh, made a complaint to MBIE that she had not been paid her holiday pay following the end of her employment (in accordance with s.27(1)(b) of the Holidays Act 2003). The Labour Inspector considered, on reasonable grounds that Advent had failed to comply with the Holidays Act.

[6] Ms Schoburgh had an individual employment agreement with Advent. The employment agreement made provision for her hours of work as follows:

5. Hours of work

5.1 Working hours. The parties agree that the Employee is being employed to perform duties in accordance with the shift arrangement of the Employer.

5.2 Lunch and other meal breaks. The Employee shall be entitled to a lunch break on each working day of employment, of one hour, to be taken at noon or such other time as the parties agree from time to time.

5.3 Variation of working hours. The Employee's hours of work may be varied as follows:

(i) By mutual agreement between the Employee and the Employer; or

(ii) If agreement cannot be reached, by the Employer, following consultation with the Employee, provided that the Employee's minimum hours of work are not reduced below 40 hours and that any increase in her hours of work is reasonable. When seeking

to vary the Employee's hours, the Employer shall act reasonably, and shall take into account the Employee's personal circumstances and commitments.

[7] The arrangement was that Ms Schoburgh would work her 40 hours, be paid for those and would be allowed to take the Friday off. Shifts were worked around this arrangement.

[8] The individual employment agreement also made provision for holidays and leave entitlement. The holiday pay arrangement in the agreement was as follows:

7.1 Holiday pay.

On each anniversary of the date of commencing employment, the Employee is entitled to four weeks' paid annual holiday. The leave can be taken at any time agreed between the Employer and the Employee. Employees must be given the opportunity to take at least two of the four weeks leave in a continuous period, if they wish to do so.

7.2 Leave pay.

The Employee shall have a minimum provision of five days' paid sick leave after the first six months of continuous employment. An additional five days' paid sick leave is gained from that point on, after each subsequent 12 month period. Sick leave days may accumulate over time.

[9] Ms Schoburgh's employment with Advent commenced on or about 1 March 2012. She was employed as an Osteopath. Her final week of work ended on or about 30 July 2013. At the conclusion of her employment, no holiday pay was paid.

[10] The Labour Inspector issued an improvement notice pointing out to the respondent that the step that could be taken to comply was to pay Ms Schoburgh 8% of her total gross earnings as payment for holiday pay owing. The Labour Inspector requested information for evidence of the steps taken to comply and the time to do so. The employer did not follow the improvement notice.

[11] In the absence of any written arrangements in regard to holidays being taken in advance or on a pay-as-you-go arrangement, since the employment did not last longer than 12 months, Ms Schoburgh is entitled to 8% of her gross earnings for holiday pay over her 4 months of employment. I accept the amount that has been calculated by the Labour Inspector without exception from the records that have been provided to the Authority.

[12] The only part of the improvement notice made under s.223D of the Employment Relations Act 2000 that has not now been fulfilled is the step that the employer could take to comply that the Labour Inspector stipulated was for Advent to pay Ms Schoburgh 8% of her total gross earnings as payment for holiday pay owing. Dr Lohr accepted that no payment had been made because of his objection. Dr Lohr has asked the Authority for ninety days to pay if he has to. The Inspector suggested 7 days for payment, but would accept 90 days if she had to.

[13] I decline the objection to the improvement notice, but under s223E (3) of the Act I have decided to vary the improvement notice to require the employer to fulfil the step that the Labour Inspector said the employer could take to comply, and that is that Advent is to pay Ms Schoburgh \$1,622.50 gross holiday pay for the period less than 12 months' employment. This includes a deduction for one day's annual leave amounting to \$200, as agreed at the time. I accept that Dr Lohr will have to arrange for the sum due to be paid and that there will be some difficulty given that the clinic has now closed. Other than that I have no evidence of any other difficulties likely to arise to make 90 days an imperative and even to be practicable to make the payment. Therefore I hold that it is more than reasonable for payment to be made in 30 days.

Order of the Authority

[14] I vary the improvement notice under s 223 E (3) of the Act to require Advent Management Limited to pay Carol Schoburgh the sum of \$1,622.50 gross holiday pay. The sum is to be paid in thirty days (30) of the date of this determination.

[15] Advent Management Limited is to provide evidence to the Labour Inspector at MBIE of the payment being made.

[16] Costs are to lie where they fall.