IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 14
5455269

	BETWEEN	GAYLEEN ANDERSON Applicant
	A N D	TRANSMAX LIMITED Respondent
Member of Authority:	James Crichton	
Representatives:	Dave Vinnicombe, Advocate for the Applicant David Renwick, Advocate for the Respondent	
Investigation Meeting:	13 January 2015 at Auckland	
Date of Determination:	20 January 2015	

SECOND DETERMINATION OF THE AUTHORITY

History

[1] In my first determination on this employment relationship problem, issued as [2014] NZERA Auckland 317 and dated 21 July 2014, I dealt with one of the two issues outstanding between the parties but reserved the second for further investigation.

[2] As filed, Ms Anderson's statement of problem identified one breach of a settlement agreement reached on 25 February 2014 and the statement in reply received from Transmax identified another breach of the same settlement agreement. Put simply, Ms Anderson alleged that Transmax had failed to pay the holiday pay that was due and owing to her and in so doing had breached the terms of clause 6 of the settlement agreement.

[3] Conversely, Transmax says that Ms Anderson had herself breached the terms of the same settlement agreement by first erroneously calculating the holiday pay that

was due and owing to her and secondly by failing to provide a proper handover as required in the settlement agreement.

[4] Ms Anderson had been employed by Transmax as administrator for over a decade when she resigned her employment on 21 February 2014. It was because of her role as administrator that on the termination of her employment, the parties agreed that she would calculate what she was owed by way of holiday pay and in a practical way, the parties had agreed that she would attend to this calculation while providing the handover to the new person.

[5] The settlement agreement between the parties records these practical arrangements and concludes with the provision that if the holiday pay is not agreed reference will be had to a Labour Inspector who *"will determine the amount"*.

[6] At the initial telephone conference that I convened with the parties, it was agreed that I would ask a Labour Inspector to review the material available in respect of the calculation of Ms Anderson's holiday pay and provide advice to the Authority and to the parties.

[7] At the initial investigation meeting on 14 July 2014, Mr Dave Myatt, a Labour Inspector with the Ministry of Business, Innovation and Employment, gave evidence on the holiday pay issue. It was immediately apparent that the information available to Mr Myatt was not complete and that he needed a further opportunity to engage more extensively with both parties in order to complete his assignment.

[8] Moreover, I was satisfied that I needed to give the parties a better opportunity to digest Mr Myatt's conclusions and make whatever submissions they thought were appropriate, both to Mr Myatt to inform his final calculations on the matter and to me so that I could understand what the parties' views were of Mr Myatt's conclusions in regard to holiday pay.

[9] On that footing then, and by agreement with the parties, in the initial determination issued on 21 July 2014, I dealt only with the employer's allegation that Ms Anderson had not fulfilled her obligations in terms of the handover.

[10] I have conveyed my conclusions in that regard in the first determination and I desire to add nothing further in respect to the handover issue. This second determination is concerned only with the question of what amount of holiday pay is

due and owing to Ms Anderson from her period of service with Transmax, and with the question of costs for the whole proceeding.

What holiday pay is owed to Ms Anderson?

[11] I commence my analysis of this question by paying tribute to the careful work done by Mr Myatt in attending to this task on behalf of the Authority. Not only am I satisfied that his conclusions are robust and in accordance with the evidence available to him but I must also record that notwithstanding occasional factual differences between Mr Myatt and one or other of the principal protagonists, he managed to maintain a respectful relationship with both parties.

[12] Mr Myatt produced two reports. The first of those reports was considered by my investigation meeting of 21 July 2014 and as I indicated in the first section of this determination, I chose to give the parties an opportunity of engaging further with Mr Myatt such that his conclusions could be informed by the parties' submissions directly to him and he could then produce a final report which the parties would have an opportunity of making submissions about, in my presence, at the second investigation meeting.

[13] For the purposes of determining Ms Anderson's entitlement to holiday pay, Mr Myatt revised downwards the number of days of unused annual leave entitlement to which Ms Anderson was due in terms of s.24 of the Holidays Act 2003 (the 2003 Act), between his first and second report. In the initial provisional report, Mr Myatt's conclusion was that Ms Anderson was due 11 days under that head; in his final report, he identifies a total of 9 days due and owing under that head.

[14] The original figure of 11 days identified by Mr Myatt in his initial provisional report was itself significantly less than Ms Anderson was claiming at 23.5 days.

[15] The difference between Mr Myatt's calculation and Ms Anderson's is set out in detailed fashion in Mr Myatt's spreadsheet and for the avoidance of doubt, I declare now that I am satisfied that Mr Myatt has correctly applied the principles of law and practice to the facts as he has discerned them and I conclude that Ms Anderson's entitlement to annual leave in terms of s.24 of the 2003 Act is 9 days.

[16] However, that is not an end of the matter and it is apparent from the exchange between Mr Myatt and Ms Anderson (assisted by her able representative,

Mr Vinnacombe) that Ms Anderson had thought that was all she was entitled to according to Mr Myatt's calculation. Of course, Ms Anderson also has entitlements pursuant to s.25 and potentially s.26 of the 2003 Act and those calculations depend entirely on the gross remuneration that she received during the period from 22 April 2013 down to 21 February 2014 being the final day of the employment.

[17] While Ms Anderson seemed somewhat concerned at the apparent dramatic reduction in her apparent entitlement to holiday pay, she seemed rather more sanguine once she appreciated that the 9 days calculation related only to her entitlement pursuant to s.24 of the 2003 Act and excluded the final part year of the employment.

[18] Mr Renwick for Transmax, while no doubt unhappy about some aspects of Mr Myatt's calculations, very sensibly observed that he was at the point of accepting the final Myatt report.

[19] After the investigation meeting, I asked Mr Myatt to obtain from Transmax the gross remuneration that Ms Anderson earned during the final part year, that is the period 22 April 2013 down to 21 February 2014 and to undertake the calculation of the total amount Ms Anderson was due by way of holiday pay using that information and the other information already to hand.

[20] Mr Myatt advises me the total amount owed to Ms Anderson in holiday pay is $5562.66 gross. I have reviewed Mr Myatt's calculations and agree with them.

Determination

[21] I direct that Transmax is to pay to Ms Anderson the sum of $5562.66 gross in settlement of the holiday pay that is due and owing to her from her employment with Transmax.

Costs

[22] Mr Vinnicombe for Ms Anderson seeks costs to be fixed at the daily tariff rate. He submitted that the matter be dealt with in this determination and not be the subject of any further discussion between the parties and I am happy to deal with matters on that basis.

[23] Transmax was given an opportunity at the investigation meeting to respond to Mr Vinnicombe's submissions on the subject and I have been able to reflect on what both parties have told me.

[24] Ms Anderson's submissions proceed on the footing that she is entitled as a matter of law to her holiday pay and that she ought not to have to incur legal costs in order to obtain payment. In fact, Ms Anderson had to pay for Mr Vinnicombe's services in two half day hearings and that is the basis of her submission that she is entitled to the Authority's customary daily tariff of $3,500.

[25] Conversely, Transmax says that there ought never to have been an engagement with the Employment Relations Authority; it points to the clause in the settlement agreement between the parties, the effect of which is that if there were a dispute about the quantum of holiday pay owed to Ms Anderson, it was to be referred by the parties to a Labour Inspector. Accordingly, it is contended for Transmax that if the settlement agreement had been complied with, Ms Anderson would not have incurred any legal costs and therefore would not be making the present claim.

[26] In response to that submission, Mr Vinnicombe pointed out that the sequence of events was that after the handover process had been completed and Ms Anderson had calculated what she thought she was owed by way of holiday pay, Transmax then objected to the quality and extent of the handover and indicated that it refused to pay holiday pay as a consequence.

[27] It is apparent on the evidence before the Authority that there was in fact an exchange of correspondence between Mr Vinnicombe and Mr Renwick commencing with a letter from Mr Renwick dated 26 February 2014 wherein Transmax first maintained that Ms Anderson had breached her obligations in terms of the handover, then claimed compensation, and then indicated that it was *"reviewing the claim for holiday pay"*.

[28] Mr Vinnicombe's response was dated 28 February 2014 and in that communication, Mr Vinnicombe effectively offered to redo the handover. That proposal was not accepted by Transmax, but notwithstanding that, the issue of Ms Anderson's holiday pay remained stalled.

[29] In a final communication from Mr Vinnicombe dated 5 March 2014, he requested payment of Ms Anderson's holiday pay by close of business on 7 March 2014, failing which the matter would have to be taken further.

[30] In the first determination on this matter, I have already made clear that I agreed with Transmax that Ms Anderson had not provided a proper handover but I considered that it had unreasonably rejected her very sensible suggestion that she redo the handover given its dissatisfaction with the original one.

[31] If that sensible suggestion from Mr Vinnicombe had been accepted by Transmax, it is likely that the issues the parties were in dispute about would have been able to be worked through face-to-face and the present dispute may not have arisen.

[32] But given Transmax's refusal to allow Ms Anderson to remedy her original default and its refusal to make any proposal in respect to her holiday pay, it is difficult for me to see what else Ms Anderson could do other than start incurring legal costs in trying to get the matter resolved.

[33] Transmax puts the issue of legal costs on the footing that Ms Anderson chose to go to the Authority in order to get her holiday pay paid out, rather than to a Labour Inspector (as their settlement agreement provided) but actually Ms Anderson had had to obtain legal advice well before there was any possibility of the matter going to the Authority and given the firm rejection of any proposal in respect to holiday pay from Transmax, what else could Ms Anderson do?

[34] Transmax made no proposal to deal with the holiday pay issue, made no suggestion of a payment into a lawyer's trust account for example, as a sign of good faith, or even took any steps itself to refer the matter to a Labour Inspector, as it correctly says the agreement between the parties required.

[35] It is not enough for Transmax to blame Ms Anderson for not referring the matter directly to a Labour Inspector when Transmax could have done precisely that itself.

[36] In all the circumstances, I have not been persuaded by Transmax's arguments in respect to costs. I think it is the author of its own misfortunes. It ought to have accepted Ms Anderson's offer to redo the handover and it ought to have made some proposal in respect to her holiday pay which she is entitled to as of right. Certainly

the calculation of holiday pay is a matter which sometimes causes disputation between parties, but it cannot be fair and just for an employer to simply stonewall an employee, require the employee to incur legal costs to pursue what she is entitled to have by force of law, and then say that it should not have to contribute to the costs the employee has incurred in pursuing what the employee is legally entitled to.

[37] I am satisfied that in addition to the payment of holiday pay which I have determined in the previous section of this determination, Transmax must also make a contribution to Ms Anderson's legal costs in the sum of $3,500.

James Crichton
Member of the Employment Relations Authority