

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 149/07
5091533

BETWEEN Jamie Barlow & Jason Carter
Applicants

AND Bushline Trust Partnership
Respondent

Member of Authority: Denis Asher

Representatives: Ms Barlow & Mr Carter represented themselves
Neal Harding for the Trust

Investigation Meeting New Plymouth, 30 October 2007

Submissions Received By 6 November 2007

Determination: 8 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In their statement of problem filed in the Authority on 26 June 2007, and as amended on 5 September and 1 October, Ms Barlow and Mr Carter said the Trust had not complied with a mediated settlement dated 12 February 2007. The remedies sought were compliance, i.e. payment of \$6,708.55 as calculated by a Department of Labour labour inspector, unspecified legal costs plus the \$70.00 filing fee, unspecified compensation for humiliation, etc and interest on the monies owed to them.

- [2] In its statements in reply filed on 9 July and 21 September the Trust said it had complied with the s. 149 mediated settlement and that the monies sought by the applicants relied on findings by a labour inspector that were not provided for in the original mediated settlement: the applicants were therefore seeking to alter the mediated settlement, which the respondent opposed.
- [3] The parties have not undertaken mediation in respect of this aspect of their employment relationship problem.
- [4] Following a telephone conference of the parties I directed that this matter be set down for an investigation in New Plymouth on Tuesday 30 October 2007. Efforts by the parties on the day to settle this matter on their own terms were unsuccessful; that is to be regretted, particularly – as pointed out during the investigation – the monies in dispute are likely to be significantly less than the costs for the parties of ongoing legal action in respect of this problem. A timetable for submissions was agreed.

Background

- [5] The applicants were employment by the Trust on 1 June 2005: Mr Carter's position was that of herd manager. His duties included milking night and morning, general farm work, feed budgeting, pasture management and record keeping for cows. Ms Barlow was employed in a part-time capacity.
- [6] The Trust is administered by Bill & Sharon Coomey.
- [7] An employment relationship problem was encountered and the parties entered into a record of settlement dated 12 February 2007.
- [8] Amongst other things the settlement provided for the following:
- Both parties agree to refer two outstanding issues of (statutory holidays & sick leave owing) to a Labour Inspector for a final & binding ruling including time for payment (if any).*
- [9] In a memorandum dated Friday 16 March 2007, a Department of Labour labour inspector set out his findings in respect of public holidays and unpaid sick leave. It was his view that the applicants “*would be eligible to an estimated minimum claim based on the information before me totalling \$4,134.90 gross*” (attachment to statement of problem).

[10] In a letter dated 27 March the mediator advised the parties of the labour inspector's determination; payment of the sum was not made by the respondent to the applicants.

[11] In their statement of problem filed on 26 June the applicants said the problem they wanted the Authority to resolve was:

Breach of our mediation settlement by not paying outstanding holiday pay/stat pay (and) sick leave as determined by labour inspector.

[12] The applicants said that the facts that had given rise to the problem were:

Both parties agreed in mediation to have the labour inspector deal with issues of outstanding Stat/Holi/Sick pay – and that his ruling be final and binding.

[13] In its statement of reply filed in the Authority on 9 July the respondent said, amongst other things, that it heard from the labour inspector only by way of correspondence on 24 May: that letter referred to an earlier request of 19 April for information – a request that was not received by the respondent. The letter of 24 May quoted a calculated entitlement of \$4,134.90, based on information supplied by the applicants only.

[14] I note here that in his original decision (attached to statement of problem) the labour inspector referred to "*public holiday pay*", rather than the term used in the parties s. 149 settlement, that of "*statutory holidays*".

[15] The respondent disputed the applicants' figures and the labour inspector's calculation. On 11 June the respondent provided the labour inspector with wage records and its calculation of the applicants' entitlement, being \$1,850.60. The labour inspector was asked to reassess his conclusions in light of the respondent's wage records.

[16] In a letter to the Authority dated 10 July 2007, counsel for the respondent – Mr Neal Harding – described the problem between the parties as "*simply one of implementing one aspect of a mediated settlement. Indeed prior to receipt of the claim ... the writer and Mr and Mrs Coomey were of the belief that the Labour Inspector's decision when given would be the end of the matter. We suggest that this matter can be resolved by simply waiting for the labour inspector to give his decision*" (Authority file).

[17] Following a telephone conference on 23 July the parties agreed to refer the matter back to the labour inspector.

- [18] In an undated "*Opinion of Findings* (between the parties)" received by the Authority sometime in the first half of August 2007, the labour inspector noted, amongst other things, that "... I have completed my investigation and review of my previous determination dated 16 March 2007, which related to a mediation outcome and a full and final binding settlement" (opening par). The labour inspector also reproduced the relevant part of the parties' agreement, that they referred "*the outstanding issues of (statutory holidays and sick leave) to a Labour Inspector*" for a final and binding decision (above).
- [19] The Opinion records how the labour inspector reviewed his original determination in light of information provided to him from the respondent on 1 August 2007: that information included a further set of time and wage records, holiday and leave records and an employment agreement (par 11 of the Opinion).
- [20] The labour inspector identified the following four issues to be determined:
- Were the applicants due and entitled to annual holiday payment at termination?
 - Were the applicants due and entitled to public holiday and alternative holiday payments?
 - Were the applicants due and entitled to payment for sick leave?
 - Has the respondent provided further evidence to change the original findings of the labour inspector?
- [21] After reviewing the provisions of the Holidays Act 2003, as amended 1 April 2007, as well as the Trust's records and the applicants' bank statements, the labour inspector determined that holiday pay for the final year of \$2,060.90 gross was owed to the applicants (par 13 a of the Opinion).
- [22] After reviewing the respondent's inconsistent records of public holidays worked, and relying on the first record, and the Holidays Act 2003, the labour inspector also determined that alternative days amounting to \$2,317.50 gross was owed to the applicants (par 16a of the Opinion).

- [23] The labour inspector also accepted the respondent's claim of one week's holiday being taken but, in the absence of evidence from either party, presumed there was a remaining, unused entitlement to annual holidays totalling \$1,506.15 gross (last page of the Opinion).
- [24] Finally, the labour inspector was satisfied from the evidence before him that the applicants were due a payment of 5 days sick leave, i.e. \$824.00 gross (second to final page of the Opinion).
- [25] The labour inspector totalled the monies due to the applicants as \$6,708.55 gross and directed that it be paid within 14 days of the date of his letter (final page of the Opinion): the respondent did not pay that sum to the applicants.
- [26] By way of an amended statement of problem filed on 5 September 2007 the applicants sought compliance with the labour inspector's determination, unspecified legal costs plus the \$70 filing fee, unspecified compensation for humiliation, etc and interest on the outstanding monies.
- [27] In an amended statement in reply filed on 21 September, the respondent said, amongst other things, that the "... *labour inspector has reported on the two outstanding issues (as well as a number of extraneous and irrelevant issues) ...*" and that the applicants "*now appear to want to alter the s. 149 agreement (to include) the two extraneous matters addressed by the labour inspector*" (par 3, above).

Discussion and Findings

- [28] The respondent's primary objection is to the meaning given by the labour inspector to the words "*statutory holidays*". Other issues are raised with the labour inspector's mathematics and the factual basis of various findings.
- [29] In respect of their primary objection, the Trust says the words "*statutory holidays*" extend only to public holidays and do not include annual holidays and holiday pay. In support of their interpretation numerous examples are advanced of government departments, Hansard speeches and Employment Court and Court of Appeal synonymous usage of the words *statutory holidays* with *public holidays*. They say the labour inspector therefore went beyond the relevant provision set out in the mediated settlement, and that it is not liable for the amounts identified under those headings by the labour inspector, as claimed by the applicants.

- [30] For their part, the applicants say that annual holidays and holiday pay are as much creatures of statute as public holidays and the labour inspector properly made findings in their favour in respect of those headings.
- [31] I agree with the applicants' position. I reach this conclusion for the following reasons.
- [32] The parties, as part of their mediated settlement, did not agree on a definition of the words "*statutory holidays*". However, I accept the applicants' reasoning that annual holidays and holiday pays are prescribed by statute and therefore properly fall within the phrase. That is because 'statutory' has the meaning of "*required, permitted, or enacted by statute*" (i.e. a written law passed by a legislative body): Concise Oxford Dictionary, 10th Ed. The relevant statute in this instance is the Holidays Act 2003. While that Act does not provide a definition of statutory holidays it does provide a definition of "*annual holiday*", meaning an annual holiday provided under sub part 1 of Part 2. Subpart 1 provides, amongst other things, all employees with a minimum of (today) 4-weeks' paid annual holidays.
- [33] It was therefore appropriate for the labour inspector, having expressly moved from using the term "*outstanding public holiday pay*" in his original decision to reproducing the parties' agreed term, that of "*statutory holidays*" in his second, to have regard to their annual holiday and annual holiday pay entitlements, as provided for by the relevant statute, so as to determine the applicants' entitlement to "*statutory holidays*".
- [34] The term used by the parties, "*statutory holidays*", enjoys a plain, clear objectively ascertainable meaning which the parties are held to have intended and to which they are bound: *Benchman Developments Limited v Robert Jones Pacific Limited* [1994] 3 NZLR 189.
- [35] The labour inspector's determination was consistent with the labour inspector's statutory role (ss. 228 & 229): the parties would have been aware of that role in agreeing to ask the labour inspector to make a final and binding decision in respect of the applicants' entitlements to statutory holidays.
- [36] It follows from the above that I do not accept the respondent's interpretation of "*statutory holidays*". What the Authority is being urged to do is to conflate statutory holidays with public holidays (the latter as defined by s. 44 of the Holidays Act 2003). It is clear that if the parties had intended the labour inspector to calculate any entitlement the applicants might have only in respect of public holidays then that is the term they would have used in their s. 149 mediated settlement. The Trust's interpretative approach, without the support of the

literal meaning of the term used and in a context very much different from the examples cited, is one of unreasonably narrowing down the meaning of that term: I do not accept its approach.

[37] I am also satisfied it is appropriate that the labour inspector's findings should be applied in full notwithstanding the respondent's concerns about his calculations and the basis for his findings. I reach this conclusion on the grounds that it was the Trust's statutory responsibility to keep wages and time records (s. 130 of the Employment Relations Act 2000) and proper holiday and leave records (s. 81 of the Holidays Act 2003).

[38] The labour inspector found in his Opinion,

In weighing all the evidence, should the Labour Inspector accept the Respondents claims yet find that the evidential material is unclear or (un)substantiated, the Labour Inspector is then constrained to make an assessment in order to achieve a practical result employing "equity and good conscience" based on jurisdiction, legislation, case law and policy obligations.

There is an obligation placed on all employer's to keep and maintain accurate (time and wage) records ... pursuant to s. 130 of the Employment Relations Act 2000 and holiday and leave records pursuant to s. 81 of the Holidays Act 2003.

I find that the records and evidential material provided by the Respondent have not reached acceptable minimum standard, overall the material evidence on holiday pay is deficient and therefore has only been used as an assessment with respect to my opinion.

[39] It seems to me entirely unfair, and inconsistent with its good faith obligations, after failing in respect of its statutory obligations in regard to record keeping, but having been given an opportunity after the end of the employment relationship to provide the relevant material, that the Trust should now take issue with a labour inspector's best efforts, based as they necessarily were on "re-constructed time, wage and holiday and leave records" (par 10 of the Opinion).

[40] Any disadvantage occasioned the Trust by the labour inspector having to reach conclusions beyond the reach of the respondent's deficient evidence is clearly the result of its own failure to meet its statutory obligations. It would be contrary to the Trust's good faith obligations to accept any of its challenges to the labour inspector's findings. That is because, amongst other reasons, the problem for determination by the Authority would not have existed but for the failure of the Trust to keep adequate and proper records.

[41] My task is not to review the labour inspector's Opinion, but to measure whether it complied with the relevant provision in the mediated settlement. Consistent with that function, I note here that there is no evidence of the labour inspector going beyond the task given him by the parties: there is no evidence of any irrational conclusions, bias or regard to irrelevant matters. There is no evidence to suggest the increased award arising out of the labour inspector's second assessment or Opinion was vindictive or a punishment of the Trust for its failure to comply with the first, or that the labour inspector has gone beyond the plain meaning of the term given to him by the parties to determine. The labour inspector's findings were also consistent with his statutory role.

Remedies

[42] In the absence of any evidence as to financial difficulties, and in compliance with the terms of the s. 149 mediated settlement, the Trust is directed to pay to the applicants within 21 days the sum of \$6,708.55 gross: s. 137 of the Employment Relations Act 2000 applied.

[43] Because of its failure to comply with its agreement to a final and binding decision by the labour inspector, I am satisfied it is appropriate to direct that interest of 9% be paid by the respondent to the applicants on the amount of \$6,708.55 from 5 September 2007 (i.e. the date of the applicants' second statement of problem) until payment is effected: Clause 11 Schedule 2 of the Act applied. Leave is reserved to the parties to return this matter to the Authority in the event agreement is not reached on the amount owing.

[44] There was limited, if any, evidence of humiliation, etc experienced by the applicants as a result of the Trust's non-compliance. What was abundantly clear was their frustration that this matter had still not been resolved. An award of damages for humiliation, etc is any way not an appropriate remedy as this matter is only distantly related to the parties' employment relationship: the claim is refused.

[45] As indicated during the investigation, costs typically follow the event. The applicants are therefore entitled to seek to recover their \$70 filing fee and a contribution to any fair and reasonable legal costs incurred by them in respect of their compliance efforts up to, including and after, filing their original statement of problem on 26 June 2007.

[46] As already advised, costs are reserved and the parties are expected to attempt to settle this matter consistent with well-known costs principles and case law.

Determination

[47] The Trust is to pay to the applicants the sum of \$6,708.55 plus interest at 9% from 5 September 2007 until the date of payment, within 21 days of the date of this determination.

[48] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority