

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 551
3037251

BETWEEN GRANT BODLE
Applicant

AND HIFX LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Tim Oldfield, counsel for the Applicant
Glenn Finnigan, counsel for the Respondent

Investigation Meeting: On the papers

Submissions [and further Information] Received: 17 July 2019 from the Applicant
17 July 2019 from the Respondent

Date of Determination: 27 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Grant Bodle, claims he is owed holiday pay by his former employer, the respondent, HIFX Limited (HIFX).

[2] HIFX denies Mr Bodle's claims. In any event, it says any claims Mr Bodle may have had against it were settled under the terms of a record of settlement (settlement agreement) signed by a mediator pursuant to s 49 of the Employment Relations Act 2000 (the Act).

Investigation meeting

[3] It was agreed between the parties that the investigation of Mr Bodle's employment relationship problem could be dealt with 'on the papers'. The parties filed a joint

memorandum setting out agreed issues. Mr Bodle filed an affidavit dated 27 June 2019. For HIFX, Mr Nathan Stanley Cheeseman, Managing Director of HIFX filed an affidavit dated 2 July 2019 and Ms Alexia Bryant, Human Resources Manager for HIFX filed affidavits dated 5 and 11 July 2019. Both parties filed legal submissions in support of their respective positions.

Relevant facts

[4] HIFX is a foreign exchange, currency exchange and international money transfer provider¹. Mr Bodle was employed by HIFX from 22 April 2013 until 21 June 2018 in the role of Senior FX Dealer/Business Development Manager. Mr Bodle's terms of employment were contained in an individual employment agreement signed by Mr Bodle and on behalf of HIFX respectively on 18 and 19 April 2013 ("employment agreement").

Remuneration

22 April 2013 - 30 June 2013

[5] Prior to Mr Bodle's employment by HIFX, he had owned and operated a foreign exchange business called Forex Commercial Limited for approximately 17 years. Upon commencement of employment by HIFX, it was agreed that Mr Bodle would migrate his clients from Forex to HIFX. In consideration for doing so, from 22 April 2013 to 30 June 2013, Mr Bodle was paid 100% commission on revenue derived by HIFX from Forex client accounts migrated by him to HIFX.

1 July 2013 – 30 June 2015

[6] From 1 July 2013, Mr Bodle was paid a "basic salary" of \$75,000 per annum until 30 June 2014. From 1 July 2014 until 30 June 2015, Mr Bodle was paid a "basic salary" of \$85,000 per annum.

[7] In addition to the basic salary, in these first two years of his employment, Mr Bodle was entitled to quarterly incentive payments under HIFX's incentive scheme. Details of Mr Bodle's remuneration package were contained in the employment agreement.

¹ <https://www.hifix.co.nz>

1 July 2015 - change in role and remuneration

[8] From 1 July 2015, Mr Bodle's role and remuneration changed. The changes were detailed in a letter from Mr Cheeseman to Mr Bodle on 5 May 2015. Mr Bodle's base salary increased, and he continued to receive quarterly incentive payments. During the course of his employment, Mr Bodle received incentive payments based on both his financial and work performance.

[9] Mr Bodle says he raised issues early on in his employment about his holiday pay. He was concerned that his incentive payments were not included in his gross earnings which affected his holiday pay. This meant he received less remuneration when he was on holiday than when he was working.²

[10] There was no resolution of this matter and it appears it was not taken any further by Mr Bodle.

End of employment

[11] On 15 June 2018, Mr Bodle was requested to attend a disciplinary meeting concerning a client matter. However, the meeting did not proceed. Instead, the parties decided that Mr Bodle's employment would terminate, on agreed terms.

[12] A settlement agreement was entered into between the parties on 21 June 2018. It was signed by a mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE). Ms Bryant signed the settlement agreement on behalf of HIFX and Mr Bodle signed it.

Record of settlement

[13] Relevant provisions of the settlement agreement are as follows:

Background

...

- D. The parties have agreed to resolve the issues between them and all matters relating to the Employee's employment and its termination thereof are settled on the following terms as set out in this agreement (the "Agreement") as a full and final settlement and request a mediator sign this Agreement pursuant to section 149 of the Employment

² Bodle affidavit, para 25

Relations Act 2000, by the parties confirming their understanding to the mediator that this agreement is a full and final settlement.

Agreed Terms of Settlement

...

3. This is a full and final settlement of all matters or claim the parties have or may have against each other arising out of their employment relationship, including the ending of that employment relationship. The employee acknowledges he remains bound by provisions in his employment agreement intended to continue after the employment has ended.

...

8. Within seven days from the Termination Date, the Employer will pay the Employee for any outstanding pay and accumulated annual leave, calculated up to and including the Termination Date. (subject to deduction for tax).
9. Within seven days from the Termination Date, the Employer will pay the Employee four weeks' pay in lieu of notice. (subject to deduction for tax).
10. The Employee will be paid by direct credit into the Employee's account number previously given to the Employer, within seven days from the date the mediator signs the Agreement the 30 June 2018 bonus (subject to deduction for tax). Once the bonus has been calculated (at the conclusion of the end of the current quarter). ...
15. In reaching the Agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, or the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016) as defined by the Employment Relations Act 2000.

[14] There were other provisions relating to the payment of compensation to Mr Bodle pursuant to s 123 of the Act, legal fees and in relation to non-disparaging remarks by either party.

[15] The settlement agreement was certified under s 149 of the Act by the mediator. That certification confirmed that before signing the agreement, the parties were advised and accepted they understood the effect of s 148A in respect of entitlement to minimum entitlements, s 149(1) of respect of the authority of the mediator to sign the settlement and s 149(3) of the Act which states that the agreed terms of settlement:

- (a) Were final, binding and enforceable; and
- (b) Could not be cancelled; and
- (c) Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.

[16] Mr Bodle says he was not paid the correct amount of holiday pay during the course of his employment by HIFX and that the settlement agreement did not compromise and settle his claim for holiday pay arrears.

[17] HIFX says Mr Bodle was paid the correct amount of holiday pay. However, in any event, it says the settlement agreement was in full and final settlement of all matters or claims arising out of the employment agreement.

Issues

[18] The parties have identified issues for the Authority to determine. The parties agree that the Authority's determination should deal with liability only and not remedies.

[19] The issues for determination by are:

- (a) Whether HIFX properly calculated holiday payments to Mr Bodle, by not including incentive payments;
- (b) Whether clause 3 of the record of settlement compromised and settled any claim for holiday pay arrears, if held to exist;
- (c) Whether clause 8 of the record of settlement created an obligation in respect of holiday pay arrears, if held to exist;
- (d) Whether, assuming clause 8 of the record of settlement properly interpreted did not cover unpaid holiday pay in respect of leave already taken, whether clause 3 of the record of settlement settled any claim in respect of holiday pay relating to additional paid leave provided for in clause 9.2 of the individual employment agreement.
- (e) Mr Bodle has identified a further issue for determination by the Authority as follows:
 - (i) If the settlement agreement agreed to forego all or part of Mr Bodle's entitlements under the Holidays Act 2003 (the Holidays Act), does

s 149 of the Act still apply and may Mr Bodle still recover arrears of holiday pay and/or penalties under the Holidays Act notwithstanding the settlement?

First Issue

Did HIFX properly calculate holiday pay payments to Mr Bodle, by not including incentive payments?

[20] Mr Bodle says that the incentive payments he was paid during the course of his employment by HIFX form part of “gross earnings” under s 14 of the Holidays Act. He says these payments were not included by HIFX when it calculated his holiday pay calculations and accordingly he is owed holiday pay.

[21] HIFX says the incentive payments were “discretionary payments”, HIFX was under no obligation to pay them and accordingly they did not form part of Mr Bodle’s “gross earnings”.

Holidays Act 2003

[22] Section 14 of the Holidays Act states that **gross earnings**:

- (a) means all payments that the employer is required to pay to the employee under the employee’s employment agreement, including, for example –
 - (i) salary or wages;
 - (ii) allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment);
 - ...
 - (iv) productivity or incentive-based payments (including commission).
 - ...
- (b) excludes any payments that the employer is not bound, by the terms of the employee’s employment agreement, to pay the employee, for example:
 - (i) any discretionary payments.

[23] Mr Bodle says that the incentive payments he received fell under s14(a)(iv) of the Holidays Act. This was because they were “incentive – based payments (including commission). Therefore those payments formed part of his “gross earnings”.

[24] HIFX says the incentive payments made to Mr Bodle were “discretionary payments”. As such they were excluded from forming part of Mr Bodle’s “gross earnings” by virtue of s 14(b)(i) of the Holidays Act.

Employment agreement

[25] Clause 7.1 of the employment Agreement states that HIFX “... will pay the employee the salary and benefits specified in **Schedule 2**”. Clause 7.3 states that the “remuneration and benefits provided for in this agreement constitute the consideration for the overall performance of the employee’s job and no overtime penalty or additional payments are payable ...”.

Schedule 2 of the employment agreement

[26] Item 1 confirms Mr Bodle’s start date with HIFX as 22 April 2013. Relevant sections of Schedule 2 are as follows:

Item 2: Salary and benefits

Basic Salary

Salary payments will commence from 1 July 2013. During the training and induction period from 22 April 2013 to 30 June 2013, you will be provided with commission Mr Bodle from any accounts that migrate from Forex Commercial Limited and transact via HIFX Limited as outlined in your employment offer email.

Year 1 (1/7/2013-30/6/2014) \$75,000 per annum paid monthly in arrears

After Year 1 \$85,000 per annum paid monthly in arrears

Quarterly Incentive Payments

An incentive payment is available from 1 July 2013. Details of the scheme and applicable targets will be provided at that time

Year 1 (1/7/2013-30/6/2014) Business Development KPIs

Year 2 (1/7/2014-30/6/2015) FX Dealer KPIs

Entitlement to an incentive payment under the incentive scheme will be determined on a quarterly basis.

Entitlement to the incentive will be determined by HIFX’s assessment of your job performance against the KPIs applicable for the role.

HIFX may at its discretion take into account other information in assessment of performance and payment.

Assessments and payments are entirely within HIFX’s discretion and are final. The employer may vary or withdraw the incentive scheme at its discretion.

Letter of 5 May 2015 altering Mr Bodle's role and remuneration

[27] On 5 May 2015, Mr Cheeseman wrote to Mr Bodle setting out details of the change in his role and remuneration from 1 July 2015. The letter provides a short overview of Mr Bodle's employment arrangement when he started and set out a new arrangement including an increase in base salary.

[28] Mr Bodle's base salary was to increase and did increase from \$85,000.00 per annum to \$140,000.00 per annum from 1 July 2015. The letter went on to state:

You are currently eligible to earn quarterly KPIs based on agreed targets. The quantum is based on a percentage (50%) of your base salary. This will remain the case going forward and therefore your overall remuneration for the role you perform as a corporate dealer will increase substantially when you take into account the salary and incentive amendments. You will also move on to a new set of KPIs that are better aligned with the rest of the dealing team from 1 July 2015. These will be provided to you in due course. ... We look forward to your continued integration and growth within our business.

Mr Bodle's claim

[29] Mr Bodle says the incentive payments were payments HIFX was obliged to pay him. Therefore, they are "gross earnings" for the purposes of s14 of the Holidays Act.

[30] Mr Bodle says that during the five years of his employment by HIFX he received an incentive payment 19 out of 20 quarters. The one quarter in which he was not paid was later made up when his team made the year billage target. He was then paid two quarters in the final quarter of one year. Therefore, he says he received quarterly incentive payments 20 out of 20 quarters.³

[31] Mr Bodle says at no stage during the course of his employment did HIFX seek to withdraw the incentive scheme and did not attempt to withhold incentive payments even if he met targets. In his view, the incentive payments were a regular part of his income.

HIFX's response

[32] HIFX says the incentive payments are ones that it was not bound to pay Mr Bodle as they amounted to "discretionary payments". Accordingly, they are excluded from "gross earnings" under s14 (b)(i) of the Holidays Act.

³ Bodle affidavit para 11

[33] In support of this argument counsel for HIFX relies on the wording in Schedule 2 of the employment agreement that Mr Bodle's entitlement to an incentive payment will be determined quarterly and assessments and payments are entirely within HIFX's discretion.

Discretionary payment

[34] Discretionary payment is defined in section 5(1) of the Holidays Act.

5 Interpretation

(1) In this Act, unless the context otherwise requires,-

discretionary payment –

- (a) means a payment that the employer is not bound, by the employee's employment agreement, to pay the employee; but
- (b) does not include a payment that the employer is bound, by the employee's employment agreement, to pay the employee, even though
 - (i) the amount to be paid is not specified in that employment agreement and the employer may determine the amount to be paid; or
 - (ii) the employer is required under that employment agreement to make the payment only if certain conditions are met

[35] The wording contained in Schedule 2 make it clear in my view that the incentive payments to Mr Bodle were discretionary. The relevant words and phrases include:

- Entitlement to an incentive payment under the incentive scheme will be determined on a quarterly basis.
- Entitlement to the incentive will be determined by HIFX's assessment of [Mr Bodle's] job performance against the KPI's applicable for the role.
- HIFX may at its discretion take into account other information in assessment of performance and payment.
- Assessments and payments are entirely within HIFX's discretion and are final
- The employer may vary or withdraw the incentive scheme at its discretion.

[36] The incentive payments as worded make it clear in my view, that there is a discretion regarding the information that HIFX was able to take into account in conducting assessment

of job performance and HIFX retained a discretion to make the payments. I agree with the submission on behalf of HIFX that the discretion related to not only the assessment of quantum but also whether payments were made.

[37] The incentive payments made to Mr Bodle were described in his payslips (attached to Ms Bryant's affidavit) as "discretionary incentive" which supported the categorisation of those payments in the employment agreement as discretionary.

[38] The fact that Mr Bodle was paid incentive payments does not mean that HIFX did not retain a discretion in respect of payment. The fact that HIFX did not withdraw the incentive scheme during Mr Bodle's employment does not indicate the scheme was not discretionary.

[39] The answer to the First Issue is: "Yes".

Second Issue

Whether clause 3 of the Record of Settlement compromised and settled any claim for holiday pay arrears, if held to exist.

[40] I have made a finding that HIFX did properly calculate holiday pay payments to Mr Bodle. He therefore does not have a claim for holiday pay arrears.

[41] Accordingly, I am not required to determine the Second Issue.

[42] If I am incorrect, the question is whether clause 3 of the settlement agreement settled any claim for holiday pay arrears.

[43] Shortly after receiving a letter to attend a disciplinary investigation meeting, HIFX and Mr Bodle agreed on terms on which his employment with HIFX would terminate. These terms were recorded in a settlement agreement under s 149 of the Act. The relevant provisions of the settlement agreement are contained in para [13] of this determination.

[44] Clause 3 of the settlement agreement states that the agreement was in full and final settlement of all claims the parties "have or may have against each other arising out of the employment relationship including the ending of the employment relationship".

[45] Mr Bodle had raised issues with HIFX about his “holiday pay arrears” and his understanding that the incentive payments should have been included as part of his gross income.

[46] At paragraph 26 of his affidavit, Mr Bodle says that in his first year of working at HIFX he spoke to the then Chief Financial Officer, Andrew Teal and raised the fact that he was being paid less when he was on holiday or leave, than he was when he was working. This position was rejected by Mr Teal who said that his holiday pay was being paid correctly. Mr Bodle says that on 18 May 2018, he sent an email to HIFX’s current chief financial officer, Michael van Dorsten attaching an article in the New Zealand Herald about holiday pay. Mr Bodle says he sent the article for the purpose of raising again with HIFX the issue of his annual leave entitlement. This was because he did not accept he was being paid holiday pay correctly.

[47] Ms Bryant at paragraph 11 of her affidavit dated 5 July 2019 says that Mr Bodle had previously raised the issue regarding the calculation of the holiday pay and this in her view was one of the matters intended to be settled by the settlement agreement.

[48] The issue of Mr Bodle’s holiday pay arrears was a live issue known to both parties prior to the signing of the settlement agreement. If the issue was not to have been covered by clause 3 of the settlement agreement, this could have been provided for in the agreement. It was not.

[49] I have found that Mr Bodle does not have a claim for holiday pay arrears. If I am wrong in my finding and Mr Bodle does have a claim for holiday pay arrears then I consider it unlikely that the settlement agreement could compromise a claim for minimum entitlements.

[50] The Employment Court in *8iCorporation v Marino*⁴ stated:

“Only approved mediators may sign-off on a s 149 agreement. In undertaking their functions they are exercising a statutory power. It is well established that a statutory power must be exercised in accordance with principle and consistently with the empowering statute. A mediator may, but need not to, exercise their discretion to sign an agreement in response to a request from the parties. The point can be made by reference to terms which the Act expressly

⁴ *8iCorporation v Marino* [2017] NZEmpC 69 at [43] 26 *Employment Relations Act 2000*, s148A

provides a mediator *must not* sign-off on, namely agreed terms of settlement in which a party agrees to forego all, or part, of the party's minimum entitlements specified in s148A(3).²⁶

²⁶ Employment Relations Act 2000, s 148 A

[51] It is not possible to contract out of minimum entitlements including those in the Holidays Act as set out in s148A(3) of the Act, in a settlement agreement pursuant to s149 of the Act.

Third Issue

Whether clause 8 of the record of settlement created an obligation in respect of holiday pay arrears (if held to exist).

[52] Clause 8 of the settlement agreement provided for payment to Mr Bodle of “any outstanding pay and accumulated annual leave, calculated up to and including the Termination Date...”

[53] Mr Bodle claims this entitles him to payment of arrears of holiday pay under the settlement agreement itself. I do not accept that interpretation. The plain meaning of the words is that HIFX is to pay the balance of untaken annual leave according to HIFX's pay records. Clause 8 was intended to ensure that if after having taken annual leave, Mr Bodle was still owed leave, this would be paid out to him upon termination. Leave was owing and payment was accordingly made to Mr Bodle.

Fourth Issue

Whether, assuming clause 8 of the record of settlement properly interpreted did not cover unpaid holiday pay in respect of leave already taken, whether clause 3 of the record of settlement settled any claim in respect of holiday pay relating to additional paid leave provided for in clause 9.2 of the individual employment agreement.

[54] This claim relates to a lack of payment of an additional agreed leave component detailed Clause 9.2 of the employment agreement states:

Extra Paid Leave

All permanent staff will be eligible for one additional day's paid annual holiday for each completed year of employment up to a maximum of five days. All permanent staff will therefore get an additional day's paid annual holiday on the anniversary of their start date and this will continue up to and including five years continuous employment with the employer.by agreement

between the employer and employee all or part of this entitlement may be paid instead of the employee taking the additional holiday.

[55] Mr Bodle engaged the services of Drumm Nevatt and Associates (DNA), Chartered Accountants to assess the amount due under this provision. DNA produced a report on 28 January 2019 which included its assessment of the amount due for the “extra paid leave entitlement” under clause 9 as amounting to \$12,647.89.

[56] I accept the submission made on behalf of HIFX that this relates to additional annual leave and is contractual in nature. It relies on the employment agreement and is not a claim based on a claimed statutory entitlement. Therefore the claim would fall within clause 3 of the record of settlement as a claim the parties may have against each other arising out of their employment relationship. The claim was settled in full and final settlement.

[57] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority