



### **Adjournment application**

[3] The notice of objection was lodged by counsel for the company but she subsequently advised the Authority that David O'Neill (the company's director) wished to represent the company. However, the company did not participate in the directions conference during which the date was set for the investigation meeting and other directions were made. There followed mediation but that did not resolve the problem. Several days before the investigation meeting, counsel (with new instructions) sought an adjournment to allow for Mr Grafton to be joined as a party and for statements of evidence to be prepared. That was declined. Mr Grafton was going to be present at the meeting so it was not necessary to adjourn to deal with joinder. The company had already failed to meet the date set for statements, I was satisfied that the notice of directions and notice of meeting had been served on it so it was the author of its own problems in terms of timing.

### **The first ground**

[4] In a letter dated 19 March 2007, the company's solicitor asserts *Mr Grafton was originally employed on a permanent casual contract*. There, and in subsequent correspondence, that is explained by reference to the company's business being dependent on good weather. As a result, says the company, there was no certainty about the days or hours of work available to maintain regular and consistent employment.

[5] Mr Grafton was paid twice monthly. From pay records it can be seen that his hours of work did vary but there was nothing casual about his employment. From the outset, it was clearly permanent, ongoing and more or less full time.

[6] Mr Grafton was not given or asked to sign a written employment agreement initially. There is an evidential dispute about what was said at the commencement of the employment regarding holiday pay. Mr Grafton denies that there was any agreement or mention about holiday pay being paid at the same time as his regular wages. David O'Neill says that there was an agreement for Mr Grafton to be paid holiday pay with his regular wages.

[7] The point is answered conclusively by s.28 of the Holidays Act 2003. That codifies the situations in which an employer may pay holiday pay to the employee regularly despite the general rule expressed by s.27 of the Act that holiday pay must

be paid at the time of annual holidays. The Act provides that four conditions must be satisfied before an employer can lawfully pay holiday pay on a regular basis. In the present case, in the first period of the employment, at least three conditions were not satisfied.

[8] First, Mr Grafton was not employed on a fixed term agreement nor was his work on a basis so intermittent or irregular that it was impracticable for him to be provided with annual holidays. Therefore, neither limb of the first condition was met.

[9] Secondly, I prefer Mr Grafton's evidence about the original arrangements over employment. Accordingly, even if it was legally permissible to verbally agree on the inclusion of holiday pay with the regular wages, that did not happen. Therefore, the second condition was not satisfied. This finding also disposes of the argument that there was no meeting of the minds about the rate of pay. There was and it was agreed at \$15.90 per hour.

[10] The third condition is that *the annual holiday pay is paid as an identifiable component of the employee's pay*. Mr O'Neill says that Mr Grafton was given pay slips but that is disputed by Mr Grafton. However, Prudence Petrie (also a shareholder in the company) told me that the payroll software did not originally provide for holiday pay to be separately shown on the payroll report or the payslips. Ms Petrie also told me that she entered the separate holiday pay data later once the software upgrade was installed. Her evidence was by way of explanation of differences in documents called *Employee Summary Report*. Careful scrutiny of these documents provided to the Authority shows some errors in this exercise. Even if I accepted Mr O'Neill's evidence about pay slips having been given to Mr Grafton, the pay slips could not have shown the holiday pay as an *identifiable component* of Mr Grafton's pay until the software upgrade was installed, certainly some significant time after Mr Grafton's employment had started. For this first period, at best, Mr Grafton might have received a pay slip showing his hours, gross earnings and net pay. From this I find that the holiday pay was not paid as an identifiable component of Mr Grafton's pay so the third condition was not satisfied here.

[11] It also follows that the fourth condition about the payment being made at the correct rate of holiday pay was not met either.

[12] In conclusion, even on the best view of the evidence from the company's perspective, its initial employment of Mr Grafton fell outside the limited circumstances in which regular payment of holiday pay is permitted. Accordingly, s.28(4) of the Holidays Act 2003 applies.

### **Written employment agreement**

[13] Around August 2005, the company provided a draft employment agreement to Mr Grafton. That much is not in dispute. However, there is some controversy about the content of the signed agreement. I have been given three documents. The first is at least partly an original with some blue and black pen writing by Mr O'Neill and Mr Grafton respectively dated 1 September 2005. The last page (p.13) headed *Schedule Three* has typewritten headings but blue handwritten details. After the heading *2. Hourly pay* it reads in handwriting *\$17/hr + 6% holiday pay → \$18.02/hr. Evening meals supplied in exchange for public holidays.* This page is not signed. There is also some doodling on the first page which must have been done later in time.

[14] The second document was lodged with the statement in reply. It is a photocopy of the first document but does not include the doodling from the first page. The Labour Inspector says (and I accept), that it was supplied by the employer's solicitor after the termination of the employment.

[15] The third document was also lodged by the Labour Inspector. It came to him via Mr Grafton's solicitor who first took up issues with the employer. That solicitor was given it by Mr Grafton. Mr Grafton's evidence is that he received this copy from Mr O'Neill after requesting a copy of the original signed agreement. Mr O'Neill's evidence is that he kept the one signed original and never gave anyone (including Mr Grafton) a copy. The third document is identical to the first and second documents except for the last page (p.13). That reads *2 Remuneration* and there is no handwriting after that or any of the other sections on the last page. It also differs from the other two documents by having two typewritten sentences alongside *1 Hours*. The final difference is the use of underlining in the typed headings.

[16] The significance of all this will be apparent. In September 2005, the hourly rate paid changed from \$15.90 to \$18.02. If the first document is the complete original and the second document a complete copy, it confirms Mr O'Neill's

contention that there was, at least from that date, agreement for the holiday pay to be paid regularly with the wages due.

[17] If I assume for present purposes that Mr O'Neill's evidence about the written agreement is correct and the first document is the complete original, the company still cannot overcome the difficulty that the situation falls outside the first condition that must be met for s.28 of the Holidays Act 2003 to apply. Indeed, a consideration of the terms of the written agreement supports the conclusion that Mr Grafton was permanently employed on a regular basis. Mr Grafton was not a fixed term employee, nor was his work either intermittent or irregular so as to make it impracticable to provide him with annual leave.

[18] Accordingly, from the beginning of the employment and even after the date of the written employment agreement, even on the best view of the evidence from the company's perspective, any payment of holiday pay with the regular pay fell outside s. 27 of the Act and s.28(4) applies.

[19] These findings mean that the company fails on its first objection to the Labour Inspector's demand notice.

### **The second ground**

[20] The second objection is to the effect that there is a contractual provision (the same in every version) that permits an overpayment of wages to be deducted from any subsequent wages due to the employee. On this approach, the payment of holiday pay with the regular pay but in breach of the Holidays Act 2003 should be treated as an *overpayment* and deducted from the wages and holiday pay calculated by the Labour Inspector as owing to Mr Grafton.

[21] The difficulty with this argument is that it fundamentally is at odds with the objects and specific provisions of the Holidays Act 2003. In particular, s.6(3) of the Holidays Act 2003 prohibits contracting out of its provisions. If the company was right to say that the provision in the employment agreement means that the unlawful holiday pay payments can be accounted for at the end of the employment in the way argued, ss.27 and 28 of the Holidays Act 2003 would be rendered largely irrelevant. That is clearly inconsistent with the objects of the Act.

[22] Accordingly, the second ground is rejected.

**Conclusion**

[23] Having rejected the two objections to the demand notice, I now order the company to pay to the Labour Inspector for the use of Mr Grafton the sum of \$9,271.56 gross.

[24] I was not asked to order the payment of interest.

[25] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority