Employment Court of New Zealand

Downer NZ Limited v Livingstone [2019] NZEmpC 15 (14 February 2019)

Last Updated: 19 February 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 15
EMPC 98/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DOWNER NZ LIMITED Plaintiff
AND	CLEMENT BRIAN LIVINGSTONE Defendant

Hearing:	20 August and 30 November 2018 (Heard at Auckland)
Appearances:	A Russell, counsel for plaintiff C B Livingstone, defendant in person
Judgment:	14 February 2019

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a de novo challenge to a determination of the Employment Relations Authority (the Authority).1 An oral determination was given on 28 February 2018, and the written determination was delivered on 1 March 2018.

[2] The defendant, Mr Livingstone, worked for the plaintiff, Downer NZ Limited (Downer) as a Programme Works Manager. His employment commenced on 10 August 2015 and ended when he was made redundant as a result of a restructuring within Downer. His final day of employment was 19 September 2017.

1 *Livingstone v Downer NZ Ltd* [2018] NZERA Auckland 73.

[3] At the time of termination of his employment, Mr Livingstone was in receipt of an annual salary of $91,070.00. The terms and conditions of his employment agreement provided that:

In your role you will be expected to work the time necessary to effectively complete the duties of your position. This will be no less than 40 hours per week.

[4] The agreement also provided that Mr Livingstone's annual salary would be paid on a monthly basis. Downer dealt with this requirement by dividing his annual salary into 12 equal parts and paying him accordingly. The rationale for this was that regardless of the actual number of days he worked each month, which would have been variable, he would have the

certainty and convenience of receiving a predictable sum each month. It is this process which has partially led to the present dispute.

[5] When Mr Livingstone left employment on 19 September 2017, Downer calculated his final pay for the broken month. I will deal with the formula it used to calculate this payment shortly. Mr Livingstone did not agree with the basis of calculation for several reasons and commenced a wage arrears claim before the Authority. The determination of the Authority found in favour of Mr Livingstone, accepting one of his bases for calculating final pay rather than endorsing the methodology adopted by Downer.

[6] Downer has paid Mr Livingstone the arrears awarded by the Authority, and even if its challenge is successful, it has indicated it will not seek reimbursement from him. Although the amount in dispute in this case is for a very small sum, the determination has wider ramifications for past and future dealings with other employees where calculation of payment of salary for broken monthly periods is involved.

Pleadings

[7] Downer has applied to amend the statement of claim. This amendment adds a head of relief or remedy as follows:

A declaration that it was an implied term of the employment agreement between the plaintiff and the defendant that the defendant's hours of work

were primarily from Monday to Friday 7.30 am to 4 pm, with additional reasonable hours outside these times as was required in order to complete the duties of the position.

[8] Mr Livingstone indicated that he does not oppose the amendment sought. Accordingly, there is an order granting the plaintiff leave to amend the statement of claim in the limited way sought. There is no need for Mr Livingstone to amend his statement of defence.

The days worked by Mr Livingstone

[9] As pointed out by the Authority Member in her determination, the employment agreement does not specify the days Mr Livingstone was to work. Nevertheless, Mr Livingstone agreed in his evidence before the Court that he reported for work Monday to Friday each week. He raised an issue concerning work he performed during weekends, which he claimed was overtime for which he had not been paid. This was disputed by Downer. The Water Manager - Northern Region, who was Mr Livingstone's manager, stated in evidence that the expectation was that Mr Livingstone would work between the hours of 7.30 am until 4 pm, Monday to Friday. He disputed Mr Livingstone's evidence that Mr Livingstone worked the extra hours claimed, particularly in weekends. There was no requirement or expectation that Mr Livingstone work such weekend hours.

[10] Mr Livingstone in his evidence conceded that he reported for work at the Albany office of Downer on a Monday to Friday basis. On occasion, although very rarely, he was required to do call-out work. He also indicated that he was required to deal with urgent matters referred to him by e-mail or telephone during hours outside normal working hours. However, he also conceded that the terms of his employment agreement were that the salary paid to him contemplated the work outside normal hours of 40 hours per week. He also conceded that he did not dispute that while his employment agreement did not specify the days of the week that he was to work, it was an implied condition of his contract that he would perform his work Monday to Friday. For this reason, he did not oppose the application which has been made by Downer to amend the pleadings to incorporate an allegation that there was an implied

condition in his employment agreement that he work Monday to Friday and that his salary was calculated on this basis.

[11] During the course of the evidence, it became apparent that Mr Livingstone alleged that by virtue of the extra hours when he claimed to have performed work, he had a potential claim for reimbursement and also potentially a claim based on making himself available for work. However, his indication was that he did not propose to make such claims at this stage, and I gained the impression that he was not intending to ever bring such claims separately. If he were to pursue such claims, he would need to commence further proceedings in the Authority.

Mr Livingstone's calculation as to his entitlement

[12] Mr Livingstone has raised with Downer a number of different positions regarding his calculation of the payment owing to him for the broken period in his final month at work. During the course of his evidence, he has clarified the stand he now takes, which is the position upheld by the Authority. His position now, he says, is based on legal advice he obtained. He

maintains that because he was paid on a monthly basis, and this is what the contract provides, Downer is bound to calculate the final pay by using the periodic monthly payment of salary. As the divisor, he claims the number of days in the month of retirement, which because it was September is 30, and as the multiplier the number of days he remained in employment for that month, which was 19. The formula he adopted was:

The monthly salary - $7,589.17 x 19 = $4,806.47

30

[13] He agreed under cross-examination that there was some lack of logic to this as, depending on the month of retirement, the divisor would be different, that is to say, 28 days for February and then either 30 or 31 for the remaining months. In turn, this would result in greater or lesser payments depending on the month he actually left employment. He stated that by entering into the employment agreement in the form it was, both he and Downer had accepted that the variations could occur in that way.

[14] The problem with this approach is the underlying presumption that Mr Livingstone worked every day of the year and was therefore entitled to be paid for weekend days when he did not work. The position is also distorted by using the monthly salary figure which is merely a calendar monthly apportionment of the annual salary. It takes no account of the days actually worked during the month to which it relates. Mr Livingstone justified this consequence on the basis that he worked overtime hours for which he did not receive extra payment beyond his salary.

Downer's response

[15] Downer does not accept that Mr Livingstone was required to work the weekend periods he claims. It assessed that, apart from occasions when he may have had to attend to emergency situations, which would not have been often, he should have been able to carry out his duties during normal hours, Monday to Friday. Any extra hours were covered by his salary, which was quantified accordingly. It has been accepted by Mr Livingstone that it was either an express or implied condition of his employment agreement that his 40 hours of work per week would be completed during normal working weekdays, Monday to Friday. On this basis, Downer now submits that the correct calculation of salary owing for the broken month at the end of Mr Livingstone's employment should be based on 40 hours of five weekdays of work.

[16] Downer's proposed method involves using the total number of hours worked in a total year of 52 weeks and dividing the annual salary by those hours (40 x 52 totalling 2,080) to arrive at an hourly rate. This would then be multiplied by eight to arrive at the daily rate to take account of the total number of hours worked in a day, and then further multiplied by the number of normal working weekdays between 1 and 19 September 2017 (13). This arrives at the payment owing to Mr Livingstone for the broken month in which his employment ended. Downer submits that this is the correct method. The formula based on his annual salary at termination of employment of

$91,070.00 is then as follows:

$91,070.00 = $43.78 per hour 2,080

$43.78 x 8 = $350.24 per day

$350.24 x 13 (being the total work days between 1 and 19 September)

= $4,553.12

[17] If the formula is not rounded at each step the correct total is $4,553.50. The sum of $4,553.50 was originally offered and accepted by Mr Livingstone and paid to him. However, on further reflection, he claimed this was not enough, as it did not accord with what he considered was his contractual entitlement as already discussed during this judgment.

[18] There is another shorter method of calculation Downer could use which arrives at the same result. There are 260 normal week work days (Monday to Friday) in a year. Dividing the annual salary by 260 leads to the following calculation:

$91,070.00 = $350.269 per day 260

$350.269 x 13 (being the total working week days between 1 and 19 September)

= $4,553.50

[19] This would also be an acceptable formula for Downer to adopt.

Conclusions

[20] It will be apparent from the comments that I have made throughout this judgment when discussing the claims that I do not accept the formula proposed by Mr Livingstone and accepted by the Authority in its determination. Having regard to the variable number of days in the months throughout the year, the formula adopted by the Authority would result in greater or smaller amounts being paid to an employee for a broken month. This is not a logical position. The yearly salary has simply been divided into 12 equal monthly payments to provide the employee with a constant and predictable monthly payment of salary. The monthly payment does not equate to the

number of days actually worked in a particular month. The formula also has the underlying flawed presumption that the employee is working 365 days in a year.

[21] While in the present case Mr Livingstone appears to be aggrieved by the fact that he did not receive extra payment for what he regarded as overtime work, the agreement does not back up this claim. If he intended to pursue a claim, he would need to show that there had been some agreed variation in the terms of the employment agreement to enable him to be paid over and above his salary for these alleged overtime hours. It is possible that he may also have some claim under the availability provisions of the Employment Relations Act 2000, but such a claim was not before the Authority or this Court and would need to be the subject of further proceedings.

[22] The employment agreement in this case provides an annual salary based on working 40 hours per week, Monday to Friday. Downer, in this case, has had to rely upon the condition implied in Mr Livingstone's agreement that the work was to be performed between Monday and Friday. Evidence disclosed that this was indeed how the parties interpreted the employment agreement and Mr Livingstone quite properly consented to the amendment and agreed that the condition was implied in his employment agreement. It would be preferable that Downer specify the weekly days of work in any future employment agreement.

Disposition

[23] For these reasons, the challenge succeeds. The method adopted by Downer to calculate the salary for the broken months is correct. Downer commenced this challenge on the basis that it needed certainty as to past and future applications of similar calculations it has made for other employees and as to how it should proceed in the future. As indicated, it does not propose to seek any reimbursement from Mr Livingstone of the payment it has already made to him. It is also not appropriate that there be any award of costs against Mr Livingstone even though he has not been successful in his defence of the challenge. Even though he represented himself, he presented his case in support of upholding the Authority's determination in a

competent fashion and provided information, both through submission and evidence, which has been of assistance to the Court in dealing with this matter.

M E Perkins Judge

Judgment signed at 12.30 pm on 14 February 2019
