

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 170
5598269

BETWEEN JULIE ANN EDLEY
Applicant

A N D LENCO SPORT NZ LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: A Cook, Counsel for Applicant
G West, Advocate for Respondent

Investigation Meeting: 8 June 2017 at Auckland

Submissions Received: 8 June 2017 from both parties

Date of Oral
Determination: 8 June 2017

Date of Written
Determination: 13 June 2017

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lenco Sport NZ Limited (Lenco) is a clothing manufacturing and retail business based in Henderson, Auckland. Julie Ann Edley was a former director of the company. Mrs Edley alleges she was employed and is owed wages for unpaid holiday pay and the removal of her motor vehicle.

Relevant Facts

[2] In April/May 2004, Mrs Edley was approached by Stephen McQuoid, a director of the company, to consider involvement with the company again. Mrs Edley

had left the company in or around 2003 to work in another industry. She was open to returning to Lenco.

[3] In May 2004, Mrs Edley signed an employment agreement. The agreement was between Lenco Sport NZ Limited and Julie Edley. It was signed by Mrs Edley and allegedly by Mr McQuoid but not witnessed.

[4] Around that time, discussions were held between Mrs Edley and others regarding purchasing a shareholder Peter Miller's shares in Lenco. In August 2004, Mrs Edley and others executed an options agreement to purchase Mr Miller's shares. Mrs Edley borrowed \$250,000 - \$200,000 by way of mortgage secured over her home and \$50,000 by way of interest-free loan from her brother-in-law, John Ramon. Mrs Edley was also appointed a director of the company.

Holiday pay

[5] During her employment, Mrs Edley applied for leave known as days in lieu. Her days in lieu arose from periods of time she worked on weekends for the company. She kept a handwritten record of the days in lieu owed and was not monitored about its use. As a consequence of her using days in lieu instead of annual leave, she began accruing holiday pay. At the time of this application, she has accrued 92.38 days annual leave.

[6] Paul Edley was employed in 2006. He reported to his wife Julie Edley.

Purchase of Lenco by John Ramon

[7] By May or June of 2014 Lenco was in serious financial trouble. It was accepted Lenco was insolvent. There was evidence it was unable to pay its debts to the extent that clothing stock could not be paid for and uplifted from the wharf.

[8] It was during this time the Edleys approached their brother-in-law, John Ramon, to invest in the company. During discussions about this investment, both parties exchanged correspondence which they termed "mission statements". It was in this mission statement that the Edleys offered to forego all of their holiday pay.

[9] Mrs Edley and others subsequently executed a deed of restraint of trade on 13 June 2014. The deed agreed, amongst other things, to her foregoing her option to purchase Mr Miller's shares and to sell her interests in the company to Mr Ramon.

[10] As a consequence of that deed, Mr Ramon invested approximately \$3m in the company. This was used to purchase shares, repay debt and to restructure Lenco's finances. During this period of time he brought into the company Paul Edley's sister and his life partner, Christine West.

Varied Employment Agreement

[11] Following this change in ownership, the Edley were approached by Ms West in or around June 2014. It is accepted they reached an oral agreement to vary the Edleys' employment agreements. This included removal of Mrs Edley's motor vehicle and a reduction in salary to \$27 per hour.

[12] However, 10 months later, in April 2015, Mrs Edley became dissatisfied with her employment and resigned. The matter is now before me for determination.

Issues

[13] The issues in this matter are relatively straightforward. They are as follows:

- (a) Was Mrs Edley employed by Lenco? and
- (b) If yes, is Mrs Edley owed wage arrears for unpaid annual leave and non-provision of a motor vehicle?

Was Mrs Edley employed by Lenco?

[14] I determine Julie Ann Edley was employed by Lenco Sport NZ Limited. This was evidenced by her signed employment agreement dated 20 May 2004. The fact it was not witnessed does not invalidate its terms. There seems little doubt it was signed by another director, Stephen McQuoid. There is also evidence of it being followed as to its terms.

[15] Lenco required Mrs Edley to provide particular services within certain days and hours. Lenco rewarded her for those services by way of a salary. Lenco continued up until termination to deduct and pay PAYE or taxes on her behalf. It also recorded holiday pay it owed to her.

[16] In my view, those are all the hallmarks of employment.

Is Mrs Edley owed holiday pay?

[17] Any agreement by Mrs Edley to forego holiday pay is unenforceable. Employees are not able to contract out of the provisions of the Holidays Act 2003. Holidays must be either taken or paid out in accordance with that Act. Accordingly I give no weight to the alleged mission statement that Mrs Edley had agreed to forego her holiday pay entitlement.

Accrual of holiday pay

[18] Having found Mrs Edley was employed, it is the terms and conditions in the signed employment agreement dated 20 May 2004 that govern the accrual of holiday leave.

[19] Clause 2.15 of the employment agreement states:

The employee shall be entitled to four weeks' annual holidays to be taken at a mutually agreeable time. Holiday leave may not be carried forward from one year to the next unless permission is given by the General Manager.

[20] It was accepted here that Mrs Edley had no permission from the general manager to accrue annual leave. She did allege that Mr McQuoid gave her permission to use the days in lieu. Mr McQuoid was not available to give evidence for either party.

[21] However, Mrs Edley produced an email from Mr McQuoid dated 1 June 2013 that evidenced he was not happy with the use of days in lieu instead of annual leave. That email expressed concern about the negative effect upon future lending by Lenco given the amount of holiday pay Mrs Edley and others had accrued. Mr McQuoid then remarks:

If we have days in lieu left that we use our holidays first.

[22] Despite this Mr McQuoid's concerns, Mrs Edley continued to accrue her annual leave and the company's debts increased.

Leave taken

[23] This is not a case where Mrs Edley took no leave during her employment. She was responsible for managing her own leave. There are records that leave was taken

by her totalling 116.5 days during her employment. However, these days are recorded as “*days in lieu*”. There is no record of any agreement for her to take days in lieu as opposed to annual leave.

[24] In my view her contract and Mr McQuoid’s remarks indicated the leave she did take should have been recorded as annual leave, not as days in lieu. Once her annual leave entitlement had been used, it may have been permissible for her to take additional holidays in the form of days in lieu. There was no agreement for her to accrue leave.

[25] Given the provisions of her employment agreement, specifically clause 2.15, her lack of permission to accrue annual leave and bearing in mind her co-director’s views in June 2013 that annual leave should be used before days in lieu, there was no foundation for Mrs Edley’s belief she was able to accrue annual leave in the manner that she had.

[26] Accordingly, the annual leave Mrs Edley has accrued of 92.38 days shall be offset against the leave she has taken. As a consequence there is no annual leave owed. That application is dismissed.

Is Mrs Edley owed wages for removal of her motor vehicle?

[27] In short, she is not. It was accepted in evidence there was an oral agreement made in June 2014 for removal of the motor vehicle due to the financial state of the company.

[28] Even if she did have reservations about the loss of the motor vehicle, Mrs Edley took no legal action at the time in the form of either a personal grievance for unjustified disadvantage or breach of contract action. Her action was delayed until after she had resigned and filed a statement of problem in the Authority on 30 November 2015. She also continued to receive her salary some 10 months after the oral agreement had been reached. In my view she has affirmed the varied terms of her contract by her actions.

[29] That application is also dismissed.

Costs

[30] Finally the issue of costs. The respondent has been wholly successful; however, it has incurred no legal costs because the company was represented by its director. Accordingly each party is to meet their own legal costs.

T G Tetitaha
Member of the Employment Relations Authority