

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 88
5392329

BETWEEN REDMOND VICTOR LIAM
 HANLON
 Applicant

A N D NETCENTRIC LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Paul Gillespie for Applicant
 Guido Ballara for Respondent

Investigation Meeting: 26 June 2013 at Wellington

Submissions Received: 26 June 2013

Date of Determination: 19 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Hanlon, was a technical support engineer for the respondent, Netcentric, a company providing IT services. When he left Netcentric to take up a new job, his claim for holiday pay was declined. He now seeks payment of unpaid holiday pay plus interest, together with penalties for Netcentric's failures to keep accurate holiday records, to provide him with access to them and a breach of good faith. Mr Hanlon also claims that in his three years' employment with Netcentric he was not given any opportunity, as required under his employment agreement, to obtain a performance incentive. He seeks that to be paid to him for the three years of his employment, which equates to 10% of his base salary annually. Netcentric denies all of Mr Hanlon's claims.

Factual discussion

[2] Mr Hanlon commenced work with Netcentric in October 2008. His work involved him in visiting clients' premises to assist with any IT issues. His job entailed doing a lot of work at home and out of ordinary business hours. The parties' employment agreement provided that his remuneration was deemed to fully compensate him for all time worked and all duties performed. It was also stated that he was required to work such hours as may be necessary to perform the duties and responsibilities of his position, which would normally be 40 hours per week, Monday-Friday, together with such other hours as may be agreed.

[3] Under the employment agreement Mr Hanlon was also entitled to be considered for a performance incentive. The relevant clause states:

Performance Incentive: 10% of Base Salary

A performance incentive will be based on three main criteria which will be discussed with you during a performance review at the end of each six months of employment. The criteria, assessed against the Job Description Essential Position functions, are as follows:-

1. *Achievement of Individual Position Functions.*
2. *Competency Performance against Functions.*
3. *Company performance.*

Following each six monthly review, 50% of the Incentive may be paid. The balance of which will be paid after your annual performance review.

[4] The clause does not indicate how a performance review was to be conducted. It was the evidence of Mr Roger McDonald, the principal of Netcentric, that reviews were carried out more regularly than six monthly and indeed approximately fortnightly. Mr McDonald gave no evidence, however, about how he had incorporated the three required criteria into these discussions with Mr Hanlon, and in particular the one relating to company performance. There was no evidence that Mr Hanlon was ever privy to any detailed information as to how the company was performing. What was also clear, however, was that in many instances and over a long period, Mr McDonald was dissatisfied with aspects of Mr Hanlon's performance, even although he was given pay rises which total exceeded 10% over the three years of his employment. While there were many positive aspects to Mr Hanlon's performance, including him working hard and working varied hours to meet the out of normal hours requests of clients, there were also significant concerns about some of

his behaviour which meant that he was never considered for a performance incentive payment. It is Mr McDonald's evidence which I prefer in this regard. This analysis is backed by Mr Hanlon's resignation letter which stated, amongst other things:

I would like to thank you for the many opportunities and the unlimited patience and tolerance that you have personally given me while at Netcentric. The support, guidance and the many positive memories that I will take away with me are unequalled and will go with me forever.

[5] There is no benefit in detailing the issues that arose over Mr Hanlon's behaviour, except to comment that many of them would give an employer good cause not to pay a performance incentive. My conclusion is not that these issues are proven but that Netcentric, through Mr McDonald, genuinely believed that there was substance to these concerns, and that Mr McDonald did raise them with Mr Hanlon.

[6] Mr Hanlon, for the majority of his employment, provided weekly records of his working time, which were colour coded to different clients and explained any absences. Mr McDonald, and the company associated with him that managed the wage, time and holiday records and payments to Mr Hanlon, relied on them for those purposes, but principally for billing. One of the major problems in this case was that these records were not provided to Mr Hanlon until just before the investigation meeting. Mr Hanlon had no reason to dispute them when he finally had the chance to peruse them.

[7] These records were analysed by a consultant engaged by Netcentric from Business Central. That consultant made a reconciliation between those records and the ones that Mr Hanlon was provided by an employee of the associated company that kept the records, in order to calculate any holiday pay owing to Mr Hanlon. Mr Hanlon relies on the record provided by the associated company, which indicates that he was owed \$10,562.25 net in holiday pay. However, Mr Hanlon reduced his claim to \$10,553.98 gross, as a result of his own assessment of leave he had taken that had not been recorded in the record kept by the associated company.

[8] The matter was further complicated by the fact that the associated company was not meant to keep records of Mr Hanlon after June 2012. However, this did not seem to be properly communicated to the staff of that company, who in any event were quite new and thus were not aware of the background circumstances. The matter became even more complicated as a result of Mr Hanlon failing in the last year or so

of his employment to fill in the billing/time sheets in the detail that he had previously, but instead to simply give an estimate of hours worked per client per week.

[9] On the other hand, Mr Hanlon states, and I accept, that he took no leave after June 2012.

[10] I note that the consultant's analysis is not accepted by Netcentric, and that it corrects some errors that were made by both Mr Hanlon and the employer to Mr Hanlon's advantage. Section 93 of the Holidays Act 2003 does not come into effect because there is evidence to the contrary of Mr Hanlon's claims that he is entitled to all the holiday pay he claims for.

[11] I therefore accept the consultant's analysis with one exception. Mr Hanlon applied for 12 days annual leave to attend a wedding, but I accept that he never attended that wedding and did not take leave. I do not accept Mr Hanlon's claim that he was entitled to be paid for the days between Christmas and New Year even though Netcentric had effectively closed down for Christmas. While Mr Hanlon may have taken the odd phone call lasting a few minutes over this period, he was effectively on leave. He was not restricted from undertaking any activities, including travel. A person on a salary can not expect to be paid for times when their expectation from their employer is virtually nil, and all Mr Hanlon did was spend a few minutes on the phone.

[12] Mr McDonald sought to have Mr Hanlon provide transitional assistance after he had started his new job for which he would be paid. However, Mr Hanlon never agreed to this because Netcentric would not pay his holiday pay, as it disputed he was owed anything, believing he had taken too much time off. Mr Hanlon sought a response to his claim for his expectation of holiday pay, but this was not responded to, for the reasons given above. Mr Hanlon engaged Mr Gillespie to seek this money on his behalf, which he did. Not receiving a response, he then filed with the Authority. It is clear that after the associated company ceased to have responsibility for the pay records for Mr Hanlon including his leave, that Netcentric did not keep a holiday and leave record that compiled with s81 of the Holidays Act. As a result it was not in a position to respond to requests for full holiday records as required under s82.

Determination

[13] It is clear from the above that Mr Hanlon took 41.5 days annual leave over the period of his employment. He was entitled to 60 days for his first three years plus an equivalent of 4.615 days for the extra months he worked until January 2012. As he only took 41.5 days holidays he is therefore entitled to be paid 23.115 days, which constitutes \$5,778.75 gross. Interest is sought on this sum, which is appropriate given that Mr Hanlon has lost the use of the money between January 2012 and now, a period of 18 months. That sum, at the approved rate of 5% per annum, is therefore \$443.41.

[14] It is clear that Netcentric has failed to comply with s83 of the Holidays Act, but a penalty for breach may only be commenced by a labour inspector. A penalty claim for a breach of the duty of good faith can not succeed because such duties do not survive the termination of employment. I therefore dismiss the claims for penalties.

[15] Mr Hanlon also seeks \$320 for the return of two portable hard drives that he believes remain with Netcentric. I accept the evidence of Mr McDonald that Netcentric was not aware of the location of these hard drives until Mr Hanlon told him of their likely location at the investigation meeting. I also note that Mr Hanlon has had the opportunity to attend on Netcentric's premises to seek and recover these items for many months but has declined to do so. In all the circumstances, I therefore dismiss the claim for monetary compensation. Mr Hanlon is able to locate and retrieve these hard drives at any time.

[16] The bonus was discretionary and I am satisfied that Mr Hanlon had no reasonable prospect of being awarded a bonus at any time. I therefore dismiss that claim also.

[17] I therefore order the respondent, Netcentric Limited, to pay to the applicant, Mr Redmond Hanlon, the following sums:

- a. \$5,778.75 gross in unpaid holiday pay
- b. \$433.41 gross in interest

Costs

[18] Costs are reserved.

G J Wood
Member of the Employment Relations Authority