

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 81
3011812

BETWEEN SHANE HATCHER
Applicant
AND BURGESS CROWLEY CIVIL
LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Sandy Dodunski, Counsel for Applicant
Troy Wano, Counsel for Respondent
Investigation Meeting: 17 May 2018 at New Plymouth
Submissions Received: 31 May and 21 June 2018 from Applicant
14 June 2018 from Respondent
Determination: 10 September 2018

DETERMINATION OF THE AUTHORITY

[1] The applicant, Shane Hatcher, lodged both personal grievance and wage arrears claims with the Authority. The personal grievance has since settled¹ but the arrears remain unresolved. It is that which is addressed in this determination.

[2] The arrears claim relates to leave Mr Hatcher asserts was untaken at cessation and for which there was no payment in lieu. He estimates some 19 weeks' pay owes.

[3] Burgess Crowley Civil Limited (BCCL) says the claim is ill-founded and all outstanding leave was properly paid.

Background

[4] Mr Hatcher was employed by BCCL between March 2004 and November 2016. He says that early in the employment BCCL was very busy and as a result he

¹ [2018] NZERA Wellington 19

would little or no leave from what was then a three week entitlement. On 1 April 2007 the entitlement increased to 4 weeks per annum.

[5] Mr Hatcher also claims that while BCCL operated a closedown² over the Christmas/New Year period participation was not universal. He says a small group of core employees would remain and he was often amidst that group.

[6] Mr Hatcher also says that when he did take leave he was only paid 40 hours a week and not at average earnings notwithstanding the fact he regularly worked 50 to 60 hours a week. He adds periods of leave would also be curtailed by requests he return and to which he willingly responded.

[7] Mr Hatcher says this pattern continued through the employment though he does not take issue with this on the grounds he always understood he would be paid any residue. He says notwithstanding a clause in his employment agreement stating leave should be taken within a year of the entitlement accruing³ he sought to build a significant entitlement payable on cessation and notes he was never instructed to take leave.⁴

[8] BCCL says that to the best of its recollection Mr Hatcher took leave regularly. For example it cites an annual March fishing trip along with other periods of leave it recalls. BCCL also adds the annual Christmas closedown which would, in addition to the statutory days, require each employee to take a further three to six days each year. It says these patterns are reflected in the accurate pay records it can produce from May 2010 on and adds a similar pattern exists in pay sheets it has managed to source from the 2008/2009 period.

[9] BCCL is of the view it is highly unlikely Mr Hatcher took as little leave as he now claims.

Discussion

[10] Ultimately it is for Mr Hatcher to at least establish there is, on the balance a probability, a prima facie argument his claims have some validity but before addressing that comment is required about the relevant records. Notwithstanding Ms Dodunski's efforts to convince me recent records are inadequate that is not the

² Sections 29 to 35 of the Holidays Act 2003

³ For example Clause 8.4 of the document dated 27 September 2005

evidence. As Mr Wano submits there are comprehensive records since May 2010 which mean the respondent has complied with the statutory requirement it keep records for not less than six years.⁵ There are also piecemeal records from earlier times.

[11] I also record I am not convinced by attempts to argue the records which do exist are deficient. The argument relies on two assertions. One involves an error which saw days leave in 2015 recorded as annual leave when it should have been sick leave. One clerical error does not invalidate the record. Similarly there is an argument Mr Hatcher was incorrectly debited a days leave when it transpires he was attending a course required to assist a private endeavour he as engaged in. To now try and argue leave should not have been debited as it may also have assisted the performance of his duties at BCCL fails on the grounds that was not raised at the time.

[12] The records, as they are, recorded the Mr Hatcher was owed 11 days leave as at May 2010.

[13] Mr Hatcher claims he is owed some 19 weeks leave. That implies, given the opening balance of 11 days in May 2010, that he took absolutely no leave prior to that time. The three years 2004 to 2007 entitled him to nine weeks leave or there about. The following three years to April 2010 gave another 12. That is approximately 21 weeks from which the 11 day balance may be deducted. The residual total is the 19 weeks claimed.

[14] The evidence does not, however, support such a claim or anything close. Firstly Mr Hatcher states that in the early days he was only required to fill in a leave application for longer periods of leave which he categorised as periods of 3 days or more. This was in response to BCCL's allegation the real problem was it couldn't get Mr Hatcher to fill out leave forms when leave was taken. If he took no leave as his claim originally implied he need not have complied with a requirement he record leave as he now concedes he did.

[15] Mr Hatcher also conceded he frequently failed to fill in leave forms and that BCCL was did so as a result. He accepted that as appropriate at the time and that

⁴ Section 19(1) of the Holidays Act 2003

⁵ Holidays Act 2003, s 81(4)

concession really undermines attempts to now say forms filled in by the Company must, by virtue of that fact, be false.

[16] There was then a concession he took a three week holiday around 2008. There was also a debate about whether or not he took leave for an annual week long fishing trip. He replied that was only in the last four or five years and prior to that he took individual days to go fishing. Again a concession leave was taken.

[17] Similarly the claim Mr Hatcher worked through all closedown periods weakened under questioning with his concession a return was as a result of call-backs and not a planned continuation for some. He then further weakened the claim by saying he was only called back *on several occasions*. A further weakness arose in that he said the period he really remembered in this regard was 2011 / 2012 *when drilling was busy*. That is after the period to which the claim applies.

[18] In other words Mr Hatcher conceded under questioning he was, and always had been, regularly taking leave over the Xmas / New year break. He also conceded other leave had been required to attend to family events.

[19] There is then undisputed evidence BCCL regularly monitors leave. It approaches staff when their outstanding balance comes to about 30 days. The evidence is such an approach was not required in Mr Hatchers case as it would had his claim had veracity.

[20] Mr Hatcher eventually stated he may well have taken two weeks a year but not more. The evidence clearly showed that contrary to his claim leave was being taken. When asked what he had based his claim upon he stated his records. When asked where they were the answer was in his head. That, given the way in which his answer undermined his original claim, is less than satisfactory. I have to conclude there is no real evidence the claim considerable leave is yet to be paid has veracity. Indeed it has all the hallmarks of what I suspect it was, an adjunct the original grievance claim.

[21] There is then claim that when leave was taken Mr Hatcher was only paid at ordinary rates and not average earnings. That, if true, would be an issue as the parties agree Mr Hatcher worked long hours but the claim is not supported by the documentary evidence. Indeed it shows the opposite with almost all pay periods recording significantly greater levels of pay.

[22] Given the evidence, and in particular Mr Hatcher's replies and concessions, I must reach a conclusion that even if there were deficiencies in his holiday pay, the claim is grossly overstated.

[23] The simple fact is there is almost no evidence supporting his claims. To the contrary what evidence there is undermines it.

[24] I conclude Mr Hatcher has failed to discharge the onus he carries of establishing a prima facie argument there is some wrongdoing. BCCL need answer. His claim is therefore dismissed.

[25] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority