

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 144
5404881

BETWEEN

SABINE JOHN
Applicant

A N D

RAINEY COLLINS WRIGHT
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Warwick Wright, Counsel for Respondent

Investigation Meeting: 5 April 2013 at Auckland

Date of Determination: 26 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms John) alleges that she has not been paid holiday pay in accordance with the terms of the Holidays Act 2003 (the Act). The respondent (Rainey Collins) resists that proposition and alleges that holiday pay was paid as part of her ordinary remuneration rather than separately.

[2] Ms John was employed by Rainey Collins as a senior solicitor over a short period from 1 July down to 30 September 2010. For periods on either side of those dates, Ms John was a contractor to Rainey Collins. For the avoidance of doubt, the parties understand that the Authority's jurisdiction concerns only the period of employment.

[3] There was a written employment agreement between the parties. That agreement relevantly provides that holiday pay will be paid at the rate of 8% of

Ms John's gross salary "with the employee's remuneration" on a fortnightly basis: clause 8.1.

[4] The mechanics of the remuneration are dealt with at clause 5.1 of the employment agreement. That clause provides that Ms John's remuneration is to be "paid remuneration being a percentage of fees generated by her during the employment period and paid by the client." Ms John was to receive 83% of fees paid by clients (excluding GST) where those clients were introduced by Ms John and where Ms John performed their work. Payment, according to this clause, less PAYE, ACC and other statutory deductions was to be paid into Ms John's bank account within seven days of the end of the month "*in relation to the previous month's fees paid by clients...*" to Rainey Collins.

[5] It will be discerned immediately that while clause 8.1 provides for holiday pay to be paid "fortnightly with the employee's remuneration" clause 5.1 contemplates a monthly remuneration cycle.

[6] In a practical sense, the way in which the parties dealt with the mechanics of remuneration was that whenever a relevant client paid their fees to Rainey Collins, Ms John submitted a "tax invoice" which itemised the amount claimed by Ms John in respect to the monies received on account by Rainey Collins. In particular, that calculation identifies the 83% of the fee which is payable to Ms John by way of remuneration.

[7] The essence of the dispute between the parties is that Rainey Collins maintain that in paying Ms John on her "tax invoices" they have not only paid her remuneration but also subsumed within that, have paid her holiday pay. Ms John does not accept that proposition and has submitted to the Authority and to Rainey Collins a spreadsheet which she says discloses that payment of two separate sums, an amount of holiday pay of \$842.43 and an amount of PAYE of \$244.21, are still owing to her.

[8] In respect of the PAYE amount, this amount had been paid by Ms John, and according to her, ought to have been paid by Rainey Collins. She seeks recovery of that amount as well.

[9] The Authority observes at this point that the nature of the arrangements between the parties have themselves contributed to the dispute. The arrangements are

not straight forward and it cannot be a surprise that there is now a dispute about entitlements.

[10] Further, the relevant provisions in the employment agreement, which the Authority has already referred to, are at variance. The Authority has already remarked that while one provision talks about payment on a monthly basis, the provision in respect to holiday pay talks about a fortnightly salary payment. On the evidence the Authority heard, there was never a fortnightly salary payment. Payment was made on invoice from Ms John once Rainey Collins had received payment of fees for work that she had performed.

[11] Notwithstanding the receipt from Ms John of the spreadsheet which sets out in tabulated form each of the invoices and concludes with the computation that there is an amount owing from Rainey Collins to Ms John, the Authority sought a copy of all of the “tax invoices” furnished by Ms John to Rainey Collins covering the period of the employment to see if that assisted in the Authority determining the matter. In fact, all receipt of the “tax invoices” did was confirm that the base information put into the spreadsheet by Ms John, was correct.

[12] Given that the spreadsheet identifies an amount owing by Rainey Collins to Ms John and the “tax invoices” appear to have been correctly entered into the spreadsheet, the Authority concludes that the figures owed by Rainey Collins to Ms John from the spreadsheet have persuasive value.

[13] All Rainey Collins maintains in response is that somehow the total amount paid to Ms John includes the unpaid sums of a reimbursement of PAYE and unpaid holiday pay.

[14] Indeed, in the final comment from Rainey Collins on the matter, the firm opined that the matter was not an employment issue at all, therefore outside the terms of the Authority’s remit and that Ms John had prepared and retained “all relevant records”.

[15] Those two propositions, with the greatest respect, cannot be right. First, despite the period of consultancy both before and after the employment, for a period from 1 July down to 30 September 2010, Ms John was an employee of Rainey Collins. During that time therefore her employment falls within the jurisdiction of the

Authority and the Authority has the legal power to consider disputes relating to that employment.

[16] Second, as a matter of law, Ms John is entitled to holiday pay while she is employed.

[17] Third, as Ms John's employer, Rainey Collins are required by law to keep a holiday and leave record. A similar provision is contained in s.130 of the Employment Relations Act 2000. The holiday and leave record, amongst other things, must contain information about the employee's entitlement to annual holidays, the amount of payment for any annual holiday, and the calculations made by the employer in respect to the holiday pay made to Ms John at the end of the employment. If such information exists in relation to Ms John's employment with Rainey Collins, it has certainly not been provided to the Authority. It seems that the firm has, for accounting purposes, treated Ms John's engagement as a contractual one throughout and while that might be administratively convenient, it does not comply with the law.

[18] Moreover, an employee is entitled in terms of s.82 of the Act to have access to the holiday and leave record. Ms John has made a number of requests for that information, without success.

[19] Finally, pursuant to s.83 of the Act, the Authority is entitled to conclude where the employer has failed to comply with either s 81 or s 82 of the Act that the failure to comply has affected the claimant in bringing an accurate claim and critically for our purposes, by subs (4) of s 83 the Authority may accept as proved statements by the employee in relation to holiday pay if there was no contrary evidence available.

[20] In the present circumstances, that conclusion is available to the Authority and it follows that the Authority must conclude that Ms John's claim for unpaid holiday pay is made out.

[21] Because of the Authority's conclusion that Ms John's calculations in respect to holiday pay are successful, the Authority feels entitled to also conclude that it is more likely than not that Ms John's claim in respect to reimbursement of PAYE is also made out.

Determination

[22] Rainey Collins Wright Limited is to pay to Ms John the amount of \$1,086.64 as gross holiday pay being the sum of the amount of PAYE paid in respect of the holiday pay amounting to \$244.21 and the original claim for holiday pay in the amount of \$842.43.

Costs

[23] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority