

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 131/10
5276598

BETWEEN JACOB DEMOLITION AND
 BUILDING SUPPLIES LTD
 Applicant

AND PAUL CLOTWORTHY
 Respondent

Member of Authority: G J Wood

Representatives: Winston Jacob for the Applicant
 Paul Clotworthy on his own behalf

Investigation Meeting: 10 March 2010 at Auckland

Determination: 22 March 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Jacob Demolition) claims that the respondent, Mr Paul Clotworthy, was wrongfully paid for public holidays over Christmas 2008/9 and paid holiday pay on termination of his employment to which he was not entitled.

[2] Mr Clotworthy believes he was entitled to be paid for public holidays he would otherwise have worked. He accepts that he was not entitled to holiday pay because of the parties' employment agreement, but that if he was paid holiday pay then he was not paid the two weeks pay in lieu of notice that Jacob Demolition agreed to pay at the end of his employment, and that this factor should be set off against any overpayment of holiday pay.

Facts and Findings

[3] Jacob Demolition entered into an employment agreement with Mr Clotworthy in June 2008, part of which was that Mr Clotworthy would be paid 8% holiday pay per week in accordance with the Holidays Act, included in his hourly rate of \$22 per hour. Both parties accept without question that this term was binding on them.

[4] Whilst Jacob Demolition did not guarantee to Mr Clotworthy that work would be made available to him every day, the parties agreed that his normal working hours were Tuesday to Friday from 8am to 5pm.

[5] Over the Christmas holidays Mr Clotworthy was paid for two public holidays which he did not work, but which he would otherwise have ordinarily worked. It is clear under the Holidays Act 2003 that Mr Clotworthy was entitled to payment for those public holidays and therefore I dismiss Jacob Demolition's claims over those two days.

[6] One morning in March 2009 Mr Clotworthy resigned. Mr Jacob agreed that instead of Mr Clotworthy working out any notice he would pay him in lieu of notice. Mr Jacob could not remember the period of pay discussed, but Mr Clotworthy was adamant that the period was two weeks. On the balance of probabilities I accept Mr Clotworthy's evidence that the period agreed was two weeks.

[7] Mr Jacob later decided not to pay that period because there was no such provision for payment in lieu in the parties' employment agreement. Instead, Mr Clotworthy was paid final pay in the sum of \$1,682.87 net, which constituted the three hours he had worked in that pay period, plus holiday pay at 8% of his total earnings during his employment.

[8] Mr Clotworthy did not know, however, that this was the reason for the calculation because he did not receive a copy of his pay slip at the time. Instead he assumed that it was for the two weeks pay in lieu of notice that had been agreed. Mr Clotworthy made it clear in the Authority's investigation meeting that he was prepared to pay any sum outstanding that related to holiday pay, once the two weeks pay in lieu of notice was taken into account, but this had never been clarified with him or agreed to previously by Mr Jacob.

[9] I accept that the agreement between Mr Jacob and Mr Clotworthy for two weeks pay in lieu of notice was binding on Jacob Demolition. It arose in the context of Mr Clotworthy resigning and Mr Jacob no longer wanting him working at Jacob Demolition any longer. Just because it was not contained in the written employment agreement did not mean that it was an agreement that was not binding on both parties. It is therefore appropriate to deduct that sum, two weeks wages, from the holiday pay that the parties agree was overpaid. The parties agreed that on this calculation Mr Clotworthy owed Jacob Demolition \$972.72 net.

Determination

[10] I therefore determine that the respondent, Mr Paul Clotworthy, is to pay to the applicant, Jacob Demolition and Building Supplies Limited, the sum of \$972.72 net.

[11] As the parties represented themselves throughout the investigation process in the Authority and each had some degree of success, it is unlikely that either has incurred any costs for which they can recover from the other party, although leave is reserved for submissions if either party so desires. If not, costs will lie where they fall.

G J Wood
Member of the Employment Relations Authority