

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Noel Robert Bertram Leech (Applicant)
AND Group Landscapes Limited (Respondent)
REPRESENTATIVES Lynsey Leech, Advocate for Applicant
Chris Skinner, Advocate for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 12 April 2005
DATE OF DETERMINATION 13 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application by an employee for recovery of holiday pay, sick pay and arrears of wages.

[2] Mr Chris Skinner, the operations manager for the respondent employer Group Landscapes Limited (“Group Landscapes”) (“Mr Skinner”) attended the investigation meeting to seek leave to defend Mr Leech’s claim. Group Landscapes had not lodged its statement in reply within the prescribed period and a further extension of time. Mr Skinner explained it had not done so because it was unsure about which employment agreement the applicant was relying on. I granted Group Landscapes leave to defend Mr Leech’s claim being satisfied it was just to do so and with Mr Skinner’s assurance that he was in a position to proceed at the investigation meeting.

The nature of the employment

[3] By undated letter, the applicant Mr Noel Leech (“Mr Leech”) was offered fixed term employment subject to an initial trial period of four weeks (the “letter of offer”). Attached to the letter was an employment contract said to be pursuant to the terms of the Employment Contracts Act. At the time Mr Leech commenced the employment on 23 February 2004, that legislation was not applicable.

[4] Contrary to the letter of offer and its own title “*Individual Employment Agreement for Casual/Trial Period Workers*”, the employment agreement signed by both parties on 23 February 2004, made no provision whatsoever for any fixed term employment or trial period. By clause 1(b) of the employment agreement any previous agreements were superseded by the employment agreement. Mr Leech’s employment was neither fixed term nor subject to any trial period.

[5] Nor was Mr Leech's employment a casual one as it was purported to be by the *hours of work* and *no guarantee of work* clauses. Because his hours of work were always rostered in advance, for regular days and regular hours, Mr Leech's employment had features of regularity and permanence and was not a casual but rather was a permanent full-time one. Mr Leech was a permanent full-time employee with regular and frequent rostered hours of work.

The claim for holiday pay

[6] Mr Leech claims 9.7 days as outstanding holiday pay paid to him. It is reasonable for him to make that claim, for he was provided with weekly payslips showing cumulative year-to-date totals for the balance of holiday pay accrued and owing. From his final payslips, he says he is owed 9.7 days because that is what his payslips show.

[7] The payslips do not show any separate component of his hourly wage for holiday pay.

[8] Consequent upon my finding that Mr Leech was not a casual employee, Group Landscapes was not permitted to pay holiday pays on a pay-as-you-go basis. It was obliged to allow Mr Leech paid holidays upon the anniversary of his service and if that did not eventuate, to pay him in lieu of holidays at termination.

[9] I conclude that Mr Leech is owed outstanding holiday pay of 9.7 days. I calculate the amount owing to him as \$1,319.20 being 9.7 days x 8 hours per day x \$17.00 per hour. **Group Landscapes Limited is ordered to forthwith pay to Noel Leech the gross sum of \$1,319.20 as outstanding annual leave.**

[21] As Mr Leech has not had the use of the wages owed to him as annual leave since that sum became due and payable to him, I think it fit that he should have interest on the judgment sum. **Group Landscapes Limited is ordered to forthwith pay to Noel Leech interest on the judgment sum of \$1,319.20 at the rate of 9% per annum from 22 October 2004 until the date of payment¹.**

The claim for sick pay

[10] Mr Leech claims four days sick pay in September 2004. He was paid for one day's absence that Mr Skinner says was a gratuity - not because he was entitled to sick pay.

[11] I have found that Mr Leech was a permanent part-time worker. As such, he became entitled to special leave after six months service. He is entitled to be paid the four remaining days he was not paid.

[12] I conclude that Mr Leech is owed special leave of 4 days. I calculate the amount owing to him as \$544.00 being 4 days x 8 hours per day x \$17.00 per hour. **Group Landscapes Limited is ordered to forthwith pay to Noel Leech the gross sum of \$544.00 as outstanding special leave.**

The claim for arrears of wages

[13] Mr Leech claims arrears of wages of \$4,462.50 for travelling time that he was not paid for over the entire time of his employment. While Group Landscapes' employees were paid for loading equipment, they were not paid for time travelling to work sites. The employees completed daily time sheets which recorded loading times and travelling times.

¹ \$0.325 cents daily.

[14] Mr Skinner says Mr Leech was well aware that travelling time was not paid because it was spelt out clearly in the letter of offer. He acknowledged that Mr Leech had continued to voice his opposition about that. I have already said that the employment agreement superseded any other prior agreements. Mr Skinner says the employment agreement precludes payment for travelling time because it provides at clause 6 that “*only hours worked will be paid.*” Mr Skinner obviously considers time travelling to sites is not work. While I might disagree, it would be inappropriate to change the rules after the game has been played.

[15] Mr Leech was informed of the situation, agreed to it, and accepted the terms of the employment. He was accorded an opportunity to take advice about the employment agreement. The parties intended that Mr Leech would not be paid for travelling time and that was the bargain that they both voluntarily entered into. **Accordingly, I decline to find that Mr Leech is owed outstanding wages in respect of travelling time.**

[16] I am however satisfied that Mr Leech is owed two hours arrears of wages in respect of his final wages. **Group Landscapes Limited is ordered to pay to Noel Leech the gross sum of \$34.00 as arrears of wages.**

Costs

[17] Neither party was represented. Mr Leech asks that his filing fee be reimbursed to him. I agree that it should be given his success in the matter. **Group Landscapes Limited is ordered to forthwith pay to Noel Leech the sum of \$70.00 in respect of his filing fee.**

Leon Robinson
Member of Employment Relations Authority

Summary of Orders

1. Group Landscapes Limited is ordered to forthwith pay to Noel Leech the gross sum of \$1,319.20 as outstanding annual leave.
2. Group Landscapes Limited is ordered to forthwith pay to Noel Leech interest on the judgment sum of \$1,319.20 at the rate of 9% per annum from 22 October 2004 until the date of payment².
3. Group Landscapes Limited is ordered to forthwith pay to Noel Leech the gross sum of \$544.00 as outstanding special leave.
4. Group Landscapes Limited is ordered to forthwith pay to Noel Leech the gross sum of \$34.00 as arrears of wages.
5. Group Landscapes Limited is ordered to forthwith pay to Noel Leech the sum of \$70.00 in respect of his filing fee.

² \$0.325 cents daily.