

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 209
5464198

BETWEEN VINCENT MITALAS
 Applicant

A N D EVAN CAMERON LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Nickola Cameron, Advocate for Respondent

Investigation Meeting: 27 November 2014 at Christchurch

Date of Determination: 15 December 2014

DETERMINATION OF THE AUTHORITY

- A Evan Cameron Limited is ordered to pay Vincent Mitalas:**
- (a) \$338.50 gross for underpaid statutory days.**
 - (b) \$676.20 gross for sick leave**
 - (c) \$627.90 gross (507.37 net) for holiday pay**
- B Reimbursement of the filing fee of \$71.56**

Employment relationship problem

[1] Vincent Mitalas says in his statement of problem his previous employer; Evan Cameron Limited owes him holiday pay, sick days and reimbursement for underpaid statutory days. He also said that he had no access to employment records.

[2] Evan Cameron Limited (Evan Cameron) say by way of reply that it was not clear what Mr Mitalas was claiming and that payment of staff is undertaken through its accountant. They do not agree money is owing and maintain records were provided to Mr Mitalas's solicitor.

[3] Telephone conferences were held with the Authority and the parties. After receiving wage records Mr Mitalas set out his claim as follows:

- (a) He was underpaid for 8 days of public holidays and there is a further 15.5 hours owing to him;
- (b) He is owed 30 hours of sick pay; and
- (c) He is owed holiday pay and would accept the figure originally provided by Evan Cameron.

[4] An investigation meeting was held to determine the monetary claims above. These claims are the issues to be determined by the Authority.

[5] At the investigation meeting the Authority heard evidence from Mr Mitalas, Nicola and Evan Cameron.

Underpaid statutory holidays

[6] Mr Mitalas was employed in July 2012 by E D Cameron however in August 2012 his employer became the company, Evan Cameron. The company accountant stated in an email that MYOB wage files for E D Cameron were deleted. Full records start therefore from when Mr Mitalas was employed by Evan Cameron in August 2012. For present purposes that does not present any difficulty.

[7] Mr Mitalas's employment ended in early March 2014.

[8] There was no particular disagreement that employees working for Evan Cameron generally worked about 10 hours per day in summer and 9.5 hours per day in winter between 7.30am and 5pm. They were the ordinary hours of work.

[9] The claim for underpaid statutory days is in respect of days that, but for being a public holiday, Mr Mitalas would have worked. Mr Mitalas said in his evidence that he was told to write 8 hours on his time sheet for a public holiday. I was provided at the investigation meeting with a large number of timesheets and other records relating to wages. Not every time sheet was in the bundle for the full period of employment. Some of the time sheets show 8 hours recorded for a public holiday. For an example I refer to the timesheet for the first week in June 2013. Queens' birthday is a public holiday that falls within that week. Mr Mitalas has recorded 8 hours for that day on his timesheet. For the rest of the week he worked 9.5 hours for three days and 9.75 hours for one day. I only have two time sheets for May but they record 9.5 hours per day that were usually worked for that period. Importantly the wage records show Mr Mitalas was paid consistently for public holidays at the rate of 8 hours per day.

[10] The rationale for payment of public holidays at this rate of 8 hours was that Mr Mitalas took a lot of leave which was paid, unpaid and domestic and payment was an averaging of hours in the circumstances. By way of background Mr Mitalas is the National Coach of the Under 16 Ice Hockey New Zealand team. He had to take leave to meet commitments with that team and at other times for childcare and various commitments.

[11] I turn to what the Holidays Act 1983 provides about payment for a public holiday and whether leave taken can impact on payment for a public holiday.

[12] Section 49 of the Holidays Act 2003 provides for payment if an employee does not work on a public holiday and states as follows:

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay [or average daily pay] for that day.

[13] Section 9 of the Holidays Act 2003 defines the meaning of relevant daily pay. For current purposes the relevant provision is as follows:

9(1) *In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave, -*

(a) *Means the amount of pay that the employee would have received had the employee worked on the day concerned ...*

[14] An employment agreement may specify a special rate of daily pay for the purpose of calculating payment for a public holiday. I was provided with an unsigned employment agreement between the parties. It did not specify a specific rate of relevant daily pay. For completeness this rate is required to be equal to, or greater than, the rate that would otherwise be calculated under sub-section 9 (1).

[15] Section 9A of the Holidays Act 2003 defines the circumstances in which the **average daily pay** may be used for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave or bereavement leave. It is to be calculated in circumstances where it is not possible or practicable to determine an employee's relevant daily pay under s. 9(1) or the employee's daily pay varies within the pay period when the holiday or leave falls.

[16] Relevant daily pay is the amount of pay the employee would have received had the employee worked on the day concerned. I do not consider this was a situation where it was not possible or practicable for Evan Cameron to determine the relevant daily pay for Mr Mitalas had he worked on the day in question. I find Mr Mitalas was simply asked to put down 8 hours for each public holiday on his time sheet. There was no evidence of any application of the averaging formula in 9A of the Holidays Act 1983 or indeed any reason why there should need to be aside from Mr Mitalas taking a lot of leave. That is not I find a relevant reason to pay less to Mr Mitalas than he would have received had he worked on the public holiday in question. I find on the balance of probabilities that Mr Mitalas was paid less than the relevant daily pay when he paid 8 hours per day for a public holiday.

[17] I have calculated the relevant daily pay for 8 public holidays as below:

- Waitangi Day 2014 – relevant daily pay 10 hours –day paid at 8 hours so owed 2 hours pay @ \$23 per hour being \$46;

- Christmas/January 2013/2014 – (four days) relevant daily pay 10 hours – days paid at 8 hours per day so owed 8 hours pay for the four days @ \$23 per hour being \$184;
- Canterbury Anniversary Day – relevant daily pay 10 hours - day paid at 8 hours per day so owed 2 hours @ \$22 per hour being \$44;
- Queen’s Birthday 2013 – relevant daily pay 9.5 hours - day paid at 8 hours per day so owed 1.5 hours @ \$22 per hour being \$33;
- Easter Monday 2013 – from my assessment the relevant daily pay is 9.5 hours - day paid at 8 hours per day so owed 1.5 hours @ \$21 per hour being \$31.50.

I note that there was no public holiday payment for Labour Day 2013. It is unclear whether leave taken at or about this time is related to this. There may well be other underpaid statutory days however only 8 have been claimed and I have assessed this claim on that basis.

[18] The total owing for underpaid statutory days is \$338.50 gross.

[19] Evan Cameron Limited is ordered to pay Vincent Mitalas the sum of \$338.50 gross being underpaid statutory days.

Sick Days

3, 4 and 5 March 2014

[20] The evidence supports a heated conversation took place on 3 March 2014 between Mr Mitalas and Mr Cameron. There was a dispute as to what was said but I do not find I need to resolve that. What is not in dispute is that after the conversation Mr Mitalas made a decision to leave the work site for the day on 3 March and it is that day and the next two days Mr Mitalas seeks payment.

[21] Emails sent on 3 and 4 March 2014 are relevant and I have carefully considered them. The series of emails commences on 3 March 2014 with one from Ms Cameron at 11.16am seeking clarification as to why Mr Mitalas walked away

from work. Ms Cameron asked Mr Mitalas to reply in writing by the end of that day to explain why he walked away and what he felt would be an acceptable outcome.

[22] That email was responded to by Mr Mitalas in an email he sent at 7.21pm that evening. Mr Mitalas set out in his email that after the phone call with Mr Cameron which he described as abusive he felt that he was not in a psychological condition to work on a dangerous job site effectively. He wrote *I have sought and accepted advice and feel of sound health to continue working*. Mr Mitalas said in his email that he would be giving his notice of resignation shortly and he would work the minimum 3 week notice period from that point on. He wrote that he would return to work in the morning [4 March] and do the job to the best of his ability until he leaves.

[23] I record that in his evidence Mr Cameron denied that he was abusive during the telephone call and said he was going to meet with Mr Mitalas after the telephone call but Mr Mitalas had left the site. As I have said I do not need to reach a conclusion about that matter but record that there are different views of the conversation.

[24] At 9.08pm Ms Cameron replied to the email by inserting a response in red in-between the different points Mr Mitalas had made in his email. Relevant for present purposes is that Ms Cameron asked in her email for a medical clearance before Mr Mitalas returned to work from an independent medical professional and before he could resume his work duties. Later in the email she asked for Mr Mitalas to bring an independent psychological medical clearance before work is resumed.

[25] At 9.30 pm by email Mr Mitalas responded and said amongst other matters *if you believe I am unfit for work, I will be using my sick days. As I have not been away for more than 3 days, the cost of the evaluation is your responsibility*.

[26] At 9.49pm Ms Cameron responded by email and wrote that *any leave you do take as a result of this matter will be leave without pay*. Amongst other matters Ms Cameron wrote that Mr Mitalas had mentioned that he had a psychological condition and that put doubt in their minds as to his state of mind.

[27] At 10.12pm Mr Mitalas responded and said *It will be paid sick days and I will be contacting MBIE tomorrow to ensure this. I have sick days remaining and you will not allow me to return to work because you do not feel confident I am well enough to*

work. In the same email Mr Mitalas advised that he gave two week notice. Two weeks accorded with the notice period in the employment agreement.

[28] The response to that email was on 4 March 2014 at 7.22am. Ms Cameron advised that the written resignation was accepted and feels that it would be in each parties best interests to be able to come to a mutual agreement to end the employment sooner than that. Ms Cameron wrote that in order to resume duties at the work site Mr Mitalas would need to produce a certificate to state *he is physiologically fit to conduct duties in a safe manner*. Ms Cameron wrote that Evan Cameron would not be seeking this information but Mr Mitalas had put doubt in their minds and therefore they are not liable to pay for the report or time off to get it sorted.

[29] The last email in the series supplied to the Authority is one from Mr Mitalas to Evan Cameron on 4 March 2014 at 8.29am. He sets out that his emotional issues were temporary and brought on by the telephone call from Mr Cameron. He advised that he would accept one week's pay based on the average of his last 4 pay periods in lieu of working the remaining two weeks. He noted that he would be requiring the mandatory sick day that he had to take despite his ability to return to work and that he was also caring for a sick child.

[30] There does not seem to have been any response to that email. Mr Mitalas went to see his solicitor who wrote to Evan Cameron on 13 March 2013 and advised amongst other matters that Mr Mitalas had received no response to the request for an agreement to the notice period to be worked and therefore had no option but to resign.

Conclusion

[31] In most circumstances where an employee walks off site to cool down from an emotional exchange he or she would not be entitled to sick leave for that day. What would usually happen is that a meeting would be arranged on the employee's return; Mr Mitalas had indicated that he was fit to return on 4 March 2014 to discuss the matter and any concerns from either party could be raised about the other's conduct and dealt with.

[32] Evan Cameron however chose to view the absence not simply as a cooling off period requiring a meeting when Mr Mitalas returned to work but as Mr Mitalas advising he was psychologically unwell. Mr Mitalas wrote that he was able to return to work on 4 March but he was required to provide a medical clearance described in

one email as a psychological clearance and in another as a certificate that he was physiologically fit to conduct his duties in a safe manner before he resumed duties. Mr Mitalas did not return to work for Evan Cameron.

[33] Clause 8.4 of the employment agreement between Mr Mitalas and Evan Cameron is headed *Medical Certificate Required for Sick Leave*. It provides that where the employee has taken sick leave and has been absent from work for at least three consecutive calendar days, the Employer shall be entitled to required proof of entitlement to sick leave at the employee's cost. Materially the clause also provides that:

The employer shall also be entitled to require the employee to provide proof of entitlement to sick leave within the three consecutive calendar days, at the employer's cost. The employer will inform the employee as early as possible that such proof will be required and agree to meet any reasonable expenses in getting this proof.

[34] Evan Cameron stated that it would not pay for the report or the time to get one. I find that Evan Cameron must have concluded if they considered a medical clearance to return to work was required after 3 March 2014 that Mr Mitalas was unwell and unfit for work on that day. Mr Mitalas was required to provide before resuming work a medical certificate clearing him to work at his own cost and then told he would not be paid for the time it took to obtain such medical clearance. In those circumstances he is entitled to sick leave for 3 March 2014. Mr Mitalas also seeks payment for 4 and 5 March 2014. He had sick days available. He said in evidence that he was caring for a sick child in any event for the second and third of those days but he was simply not permitted to return to work without a medical clearance. I find that he is entitled to payment for those three days.

[35] I have averaged out hours worked for the three weeks before 5 March 2014 as per the wage and time records supplied. The hours worked for those weeks were 49.5, 51.5 and 46.5. Mr Mitalas was working therefore an average of 9.8 hours per day for that period and his pay rate was \$23 per hour. \$225.40 gross per day multiplied by three is \$676.20 gross.

[36] Evan Cameron Limited is ordered to pay to Vincent Mitalas the sum of \$676.20 gross being payment for 3, 4 and 5 March 2014.

Holiday Pay

[37] The sum of \$627.90 gross was referred to as the amount of final holiday pay. Evan Cameron says that Mr Mitalas failed to give two weeks' notice and therefore no money is owed to him. I do not find that Mr Mitalas failed to give notice. He wanted to work out his notice but was not allowed to do so without medical clearance. He is owed holiday pay.

[39] Evan Cameron Limited is ordered to pay to Vincent Mitalas the sum of \$627.90 gross (\$507.37 net) being holiday pay.

Costs

[40] Mr Mitalas was not represented but does seek reimbursement of his filing fee of \$71.56. I find having succeeded in his claim he is entitled to be reimbursed for that fee.

[41] Evan Cameron Limited is ordered to pay to Vincent Mitalas the sum of \$71.56 being reimbursement of his filing fee.

Helen Doyle
Member of the Employment Relations Authority