

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brian Gordon Morrow (Applicant)
AND Hamilton City Bowling Club Inc. (Respondent)
REPRESENTATIVES Brian Gordon Morrow, in person
Warren Towers, Terry Green and Clive Thomas, for the Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 6 December 2005
DATE OF DETERMINATION 13 March 2006

DETERMINATION OF THE AUTHORITY

The Problem

[1] This matter has come to the Authority via a somewhat circular route. On 29 April 2005, Mr Morrow and the Hamilton City Bowling Club Inc (“the Club”) arrived at a mediated settlement of a personal grievance pursuant to section 149 of the Employment Relations Act 2000. The terms of settlement are confidential. Nonetheless, because there was an issue pertaining to holiday pay entitlements for a period of 6 years, it was agreed, at clause 6 of the *Record of Settlement*, that:

“Brian Morrow to make contact with a Labour Inspector of the Department of Labour, to finalise any outstanding entitlements regarding annual leave or public holidays. Brian to supply the information.”

[2] Mr Morrow subsequently contacted a Labour Inspector and provided the diaries that he kept from 1999 up to early 2005. The Authority understands that the Club takes issue with the fact that Mr Morrow was in possession of the diaries, as they are the property of the Club. That may well be so, but given that the Club has kept no records of the time worked by Mr Morrow, it is not appropriate for the Club to now to take issue about Mr Morrow’s use of the diaries to support his claim for the holiday pay that he believes is due to him.

Mr Morrow’s claims

[3] After speaking with Mr Morrow and conducting an analysis of the diaries, the Labour Inspector concluded that pursuant to the provisions of the Holidays Act 1981 and 2003, Mr Morrow was entitled to be paid for 71 days of annual leave and for 41 days in lieu of working on public holidays – a total of 112 days.

[4] Because the holiday entitlements in question accrued over the years 1999 to 2005, and Mr Morrow’s rate of pay had changed at various times, the Labour Inspector arrived at an average

pay rate of \$102.25 per day, and then calculated the gross sum due to Mr Morrow as being \$11,452.00. This was notified to the Club by the Labour Inspector via a letter dated 28 June 2005.

- [5] The Club sought the return of the diaries kept by Mr Morrow and then disputed that he was entitled to the sum in question. Mr Morrow engaged legal representation to pursue payment but the sum remains in dispute and hence has now come to the Authority for determination.

The position of the Club

- [6] While the Club accepts that Mr Morrow is entitled to be paid in lieu of some of the public holidays that he worked on¹, it largely rejects the findings of the Labour Inspector on two grounds. Firstly, the Club says that Mr Morrow did take all the annual holidays that were due to him over the periods in question, hence he is now not entitled to any further pay for them. Secondly, the Club says that Mr Morrow was not required to work on most public holidays and was not instructed to, and that, if he chose to do so, then he could not now expect to be paid in lieu of working on the days that are now claimed.

The evidence available to the Authority

- [7] (a) *The Labour Inspector's Analysis*

Consistent with what was agreed between the parties at mediation on 29 April 2005, an experienced Labour Inspector prepared a summary of what he believed was due to be paid to Mr Morrow. I have inspected that summary and note that there is a fault in the addition pertaining to the assessed annual leave entitlement. The Labour Inspector has recorded that Mr Morrow has an outstanding entitlement of 71 days. That should be 62 days. Applying the correction to the total sum claimed by Mr Morrow, the sum of \$11,452 is now reduced to \$10,531.75.

- [8] I understand that the summary produced by the Labour Inspector was largely extracted from the diaries for the respective periods. An inspection of the diaries confirms that the summary is a fair reflection of their contents. However, a question has been raised with the Authority by the Club, in relation to the period 21 June to 6 July 2004, a period of ten working days. There is an entry made by Mr Morrow for 6 May 2004 –
*“inform Clive holidays 21st June – 6 July
 11th August – 24 August”*

- [9] It appears that Mr Morrow had originally made an entry for 21 June 2004 that suggests he would be on holiday but it is difficult to decipher as a vigorous attempt with a pen has been made to ensure that it is eliminated. There is a further entry at 6 July 2004 – *“Back to work.”* An attempt has been made to eliminate this entry too but this has not been so successful. Then, for the period in question, there are very superficial entries as to the work done on the days of 21 June through to 2 July 2004.
- [10] The Club is of the view that Mr Morrow has retrospectively altered the diary and in actual fact he most probably took two weeks holiday and was not at work on the dates in question. Having put this to Mr Morrow and noted his less than credible response, I accept the view of the Club and conclude that the annual holiday entitlement due to Mr Morrow should be

¹ Good Friday, Easter Monday and Labour Day 1999 and Good Friday, Easter Monday and ANZAC Day 2000.

reduced by 10 days. The effect being that the sum now owing is reduced by \$1,022.50 to \$9,509.25.

[11] (b) *Written statements from Club Presidents*

While I accept that these statements have been provided in good faith and with the best interests of the Club in mind, I am unable to give any weight to them as they do not detract from the more tangible evidence in support of Mr Morrow's claims.

[12] (c) *Bank statements*

The club has provided a series of bank statements showing that Mr Morrow received his salary for the periods that he claims annual holiday pay for. While I accept that this is so, that is not the issue. The weight of the evidence points to Mr Morrow not having taken the annual holidays that he was entitled to under the Holidays Act and his employment agreement, and he now entitled to be paid for those holidays.

Determination

[13] On the basis of the overall evidence available to the Authority and the provisions of the Holidays Act 1981 and 2003, I find that Mr Morrow is entitled to be paid for **41** days in lieu of working on various public holidays as set out in the summary prepared by the Labour Inspector. While acknowledging the argument of the Club that Mr Morrow was not required to work on all of the public holidays in question, the fact is that it is recorded that he did. That record has been maintained in the form of the diaries kept since 1999. The diaries were always open to inspection by respective Presidents of the Club and there is no evidence of anyone taking issue with Mr Morrow about the fact that he worked on the public holidays recorded.

[14] The employment agreement also provides at clause (o) "**SUPERVISION**" that; ["the Greenkeeper shall work primarily autonomously [sic]"] Presumably, this allowed Mr Morrow to work as reasonably required to carry out his duties as set out in the agreement.

[15] I also find that Mr Morrow is entitled to be paid for annual holidays that he did not take from 2000 to 2005 – a total of **52** days.

[16] The Hamilton City Bowling Club is ordered to pay to Mr Brian Gordon Morrow the total gross sum of **\$9,509.25**. (41 days + 52 days x \$102.25 per day.)

[17] Mr Morrow also seeks payment of a penalty for the failure of the Club to keep a wages and time record. Given the nature of organisation, I do not believe it is appropriate to make this order. Nonetheless, I feel obliged to comment, that if the Club has not already done so, it should ensure that it obtains appropriate advice as to its overall obligations under the Holidays Act and the Employment Relations Act.

[18] The Club has presented invoices that it paid relating to wet weather clothing that it says is in the possession of Mr Morrow and seeks the return of this clothing. Mr Morrow is ordered to return this clothing to the Club.

Costs

Mr Morrow has sought a contribution to the legal costs that he has incurred in pursuing his claims. In normal circumstances an order would most probably be appropriate. However, I conclude that as Mr Morrow did not come to these proceedings with “clean hands” so to speak, costs shall lie where they fall.

Ken Anderson
Member
Employment Relations Authority