

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Junnie Nataniel (Applicant)
AND Golf Management and Consultancy Limited (Respondent)
REPRESENTATIVES In person, for Applicant
Dennis Siu, for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 16 April 2007
DATE OF DETERMINATION 8 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Nataniel was employed by Golf Management and Consultancy Limited from 28 July 2005 until 29 September 2006 to manage its golf shop located on Auckland's North Shore. The respondent company is owned and operated by Mr Siu. Ms Nataniel's employment ended when the shop was sold.

[2] In October 2006 Ms Nataniel filed an application in the Authority to recover alleged wage arrears and holiday pay entitlement. Mr Siu filed a statement in reply on behalf of the respondent company in October 2006 disputing the amount claimed. In early December 2006 the Authority referred Ms Nataniel's application for holiday pay entitlement to the Labour Inspectorate for an opinion. That opinion was issued on 11 December 2007. The parties have attended mediation without success. I acknowledge the parties have continued to attempt to settle this matter between them.

[3] Mr Siu accepts that the Labour Inspector's calculation is correct¹; however he says the respondent company was entitled to deduct 70 hours from Ms Nataniel's final pay for unauthorised leave taken during her employment. Mr Siu also says the reduction in salary was by agreement.

[4] An investigation meeting into this matter was held on 16 April 2007. Ms Nataniel and Mr

¹ Refer letter Dennis Siu to Labour Inspector Kris Metcalf, 16 December 2006.

Siu attended and provided evidence to the Authority.

Annual Salary

[5] The parties entered a written employment agreement on 8 June 2005. The annual salary agreed between the parties is \$31,200.00. The wage book shows that Ms Nataniel was not paid at this rate from the third month of her employment with the respondent company. She accepts the sums shown in the wage book were paid to her.

[6] Mr Siu says Ms Nataniel's salary was reduced by her agreement because she could not work 6 days per week, that her days were reduced to 5 days per week and her salary reduced proportionately. The written employment agreement was not amended to reflect these changes. Ms Nataniel says she never agreed to those variations to her employment agreement.

[7] The written employment agreement does not support Mr Siu's claim. It records that the parties agreed Ms Nataniel would work 40 hours per week for the salary of \$31,200 per annum. There is no convincing evidence that that agreement was changed.

The 70 hours

[8] Mr Siu wrote to Labour Inspector Metcalf on 16 December 2006:

"Dear Mr Metcalf

Ref your letter dated 11 Dec, 2006-2-17

Thanks for your letter about the calculations. I would have little doubt about your calculation of \$2058. However, I was also included the reason of deduction of 70 hours.

- 5 and a half days of deduction was Sick Leave as claimed in our record, which I know she is entitled to (5 days per year). I am ready to comply with proof.
- The remaining hours leave (30 hours) was originally agreed deducted from the entitlement. OR in this case, Is it more appropriate to deduct the 30 hours from the three weeks holiday pay first?

Yours faithfully

Dennis Siu"

[9] In support of his claim that the respondent company was entitled to deduct 70 hours from Ms Nataniel's final pay Mr Siu relies on the wage book and attendance record. The attendance record shows five days marked as "SL" (sick leave) and various days marked with

an "L" beside which is a number (eg, 1.5). Mr Siu says "L" represents "leave", and the number the number of hours taken as leave by Ms Nataniel on that particular day. There is no leave application form or other documentation from Ms Nataniel requesting that leave. Ms Nataniel's monthly salary was not reduced by these amounts. There are no pay slips. There is no other holiday or leave record.

[10] Mr Siu says the respondent company is entitled to deduct five days from Ms Nataniel's final pay because she did not provide medical evidence that she was sick on those days. In his evidence Mr Siu says he accepted at the time that the leave was taken as sick leave but that he wanted to see a medical certificate. Mr Siu said the five days was deducted from Ms Nataniel's annual leave entitlement at the end of her employment because he had not received the medical certificates he had requested. Mr Siu said that in the absence of the medical certificates he was not satisfied Ms Nataniel was entitled to the sick leave payments she had received and that the time off should be deducted from her annual leave entitlement.

[11] Ms Nataniel says she only took three days sick leave during her employment with the respondent company and that she was never asked for a medical certificate.

[12] Mr Siu says the respondent company was entitled to deduct 30 hours leave from Ms Nataniel's final pay because that is the total number of working hours Ms Nataniel took off to attend to family matters. Mr Siu says the respondent company accommodated these absences and that it was inconvenienced by them.

[13] Ms Nataniel says she only took short periods of time off once or twice during her employment with the respondent company and that this was when she had worked through her lunch break or had worked six days and that was told to go home if it was necessary by Mrs Siu, who is also involved in the business.

[14] Section 68 Holidays Act 2003 provides:

"(1) An employer may require an employee to produce proof of sickness or injury for sick leave taken under section 65 if the sickness or injury that gave rise to the leave is for a period of 3 or more consecutive calendar days, whether or not the days would otherwise be working days for the employee."

[15] It follows that an employer cannot require an employee to provide a medical certificate for absences of less than 3 consecutive days. Ms Nataniel's sick leave was taken on discrete days. There is no issue that the sick leave entitlement existed at the time the sick days were taken.

[16] Ms Nataniel did not have a legal obligation to provide proof of sickness for individual

day's sick leave taken under section 65 of the Act. Notwithstanding issues around the lawfulness of deductions and the accuracy of the attendance record, Mr Siu had no lawful basis to recover at the end of Ms Nataniel's employment payments for sick days taken during her employment because those sick days were lawfully taken and paid.

[17] In relation to the remaining deductions from Ms Nataniel's annual leave entitlement, other than the notations on the attendance record there is no documentary evidence of this time being taken as leave. Ms Nataniel's evidence is that she went home early or took time off on a few occasions when she had worked through a lunch break or put in extra hours and that that these absences were authorised by Mrs Siu, with whom she communicated over such matters.

[18] The notation on the attendance record does not support Mr Siu's claim that these periods of time were annual leave, that they were paid as annual leave or that he was entitled to deduct those hours from Ms Nataniel's outstanding annual leave entitlement at the end of her employment with the respondent company. The attendance record falls short of the requirement for a holiday and leave record under section 81 of the Act; the document does not record Ms Nataniel's annual holiday entitlement at any particular time², the dates those entitlements became due³, the notation "L" on the attendance record does not identify what type of leave was taken⁴ or the payment made for any leave taken⁵. In addition no record of hours worked exists. Ms Nataniel has not completed any annual leave application forms. There is insufficient evidence to support Mr Siu's claim that Ms Nataniel took the periods of annual leave he claims she did during her employment.

Determination

[19] Golf Management and Consultancy Limited is ordered to pay Ms Nataniel at the salary rate agreed in the written employment agreement dated 8 June 2005.

[20] Ms Nataniel has calculated that difference to be \$3900.00 (gross). Mr Siu did not challenge this amount. I am not satisfied that Mr Siu appreciated the consequences of not commenting on Ms Nataniel's calculations. He has 14 days from the date of this determination to file a calculation of wage arrears owed by the respondent company to Ms Nataniel, if it differs from that provided by Ms Nataniel. For the avoidance of doubt a finding has been made that the basis of any such calculation is the annual salary rate of \$32,100 per annum which was agreed between the parties and recorded in the written employment agreement.

² Section 81(2)(d) Holidays Act 2003

³ Section 81(2)(e) Holidays Act 2003

⁴ Section 81(2)(g) Holidays Act 2003

[21] Golf Management and Consultancy Limited did not have a lawful basis to deduct 70 hours from Ms Nataniel's annual leave entitlement at the end of her employment for sick and annual leave taken.

[22] The Labour Inspectorate calculated Ms Nataniel's annual leave entitlement at the end of her employment as \$2058.00 gross⁶. This calculation was based on Ms Nataniel's agreed annual salary of \$31,200⁷. I accept that this calculation is correct. \$996.42 was deposited into Ms Nataniel's bank account by the respondent company on 29 October 2007. I accept this is a Nett amount.

[23] Ms Nataniel is entitled to be reimbursed 70 hours annual leave pay at the rate of \$15 per hour, which totals \$1050.00 (gross). Based on the information I have it is unclear if the difference between \$996.42(Nett) and \$2058.00(gross) is \$1050.00. **Golf Management and Consultancy Limited is ordered to pay Junnie Nataniel \$1050 (gross) in outstanding holiday pay entitlements plus any additional amount outstanding from the difference between the Labour Inspector's calculation and the amount paid to Ms Nataniel to date.**

Costs

[24] Ms Nataniel is entitled to be reimbursed the \$70 filing fee incurred in bringing her application to the Authority. I do not understand there to be any other issue as to costs.

[25] **Golf Management and Consultancy Limited is ordered to reimburse Ms Nataniel \$70.**

Marija Urlich
Member, Employment Relations Authority

⁵ Section 81(2)(h) Holidays Act 2003

⁶ Labour Inspector's report 11 December 2006

⁷ Refer parties employment agreement dated 8 June 2005