

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Patrick Nelson (Applicant)
AND Hickory Bay Ltd (Respondent)
REPRESENTATIVES Patrick Nelson, in person
Simon Reeves on behalf of the respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING Christchurch 30 January 2007
SUBMISSIONS RECEIVED 18 February 2007 and 26 March 2007
DATE OF DETERMINATION 12 April 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Nelson alleges that he is due holiday pay by his employer the respondent, Hickory Bay Limited ("Hickory Bay").

[2] Mr Nelson also alleges that he has wage arrears owing to him as a consequence of a salary increase which he says was not implemented by Hickory Bay.

[3] Hickory Bay deny that he is due unpaid holiday leave because it contends that the effect of the relevant contractual provision was that Mr Nelson forfeited holiday leave that was not taken in the year in which it fell due.

[4] Further, Hickory Bay deny that Mr Nelson is entitled to any wage arrears claiming that the salary increase that he was paid was correctly calculated.

[5] The employment relationship began on 14 April 2003 with Mr Nelson being employed at a farm property owned by Hickory Bay on Banks Peninsula.

[6] There is dispute between the parties about precisely who employed Mr Nelson over the early part of his engagement and there is also dispute about the applicable employment agreement.

[7] As to that latter issue, it is clear that there is only one signed agreement and that document is dated 27 June 2003 and is expressed to be between Mr Nelson and Hickory Bay Limited.

[8] Interestingly though Mr Nelson's summary of earnings from the Inland Revenue Department disclose that he was employed by Hickory Bay Limited from 14 April 2003 to 31 August 2003 and then from 1 September 2003 to 16 January 2004 by an entity incorporated as The Lodge Limited. That entity I was told was an associated company of Hickory Bay Limited. The employment of Mr Nelson then continued with Hickory Bay Limited

down to 28 February 2006 when the employment relationship between the parties came to an end.

[9] It follows that with the exception of the brief interregnum from 1 September 2003 to 16 January 2004, Mr Nelson was employed continuously by Hickory Bay Limited and during that brief interregnum was employed by The Lodge Limited which I am satisfied was an associated company on Hickory Bay Limited. In my opinion, nothing turns on the change of employment and for all practical purposes, Hickory Bay was Mr Nelson's employer. The evidence produced on this point by Hickory Bay confirmed those impressions and indicated that over that brief period Mr Nelson was actually paid by The Lodge Limited. Given his employer regarded his employment as for all purposes continuous I see no reason to depart from that view taking a practical approach to the issues between the parties.

[10] The nature of Mr Nelson's duties is also a matter on which there was dispute. Hickory Bay say that during the period from April 2003 to November 2003, Mr Nelson was employed as a project manager and that he worked in that capacity in effect alongside another employee who was the overall farm manager.

[11] Mr Nelson said that he took over as farm manager in September or October 2003 and was continuing to fulfil some of the project management role well into the new calendar year.

[12] The employment relationship subsisted, as I mentioned, until February 2006 at which point Mr Nelson resigned his employment. Subsequently, Mr Nelson raised his claims in respect to unpaid holiday pay and arrears of wages.

Issues

[13] There are issues around the entitlement that Mr Nelson has to holiday leave and then issues concerning his entitlement to wages beyond the wages that he has already been paid.

[14] A consideration of the relevant contractual provisions and an analysis of them will provide an appropriate platform for dealing with the issues between the parties.

What is the applicable employment agreement?

[15] It is common ground that the only signed employment agreement is the one dated 27 June 2003 between Mr Nelson and Hickory Bay Limited. That agreement, according to the evidence I heard, was deemed to apply from the beginning of the employment relationship between the parties, then would continue in force according to its provisions until replaced by another applicable employment agreement.

[16] It is also common ground that after the execution of this first agreement (the June 03 agreement) the parties discussed more than one replacement employment agreement. With the exception of the final potential replacement agreement, which I will come to shortly, I am satisfied that the various employment agreements which the parties discussed between them but never signed have no bearing on the matters now in dispute between Mr Nelson and Hickory Bay.

[17] The exception is the final unsigned potential replacement employment agreement which is a document which was given to Mr Nelson by Mr Reeves of Hickory Bay on 15 September 2005. For that reason, I will refer to that agreement as the September 2005 agreement.

[18] I am satisfied that, save as to the application, if any, of any variations the parties made to their employment arrangements as a consequence of the September 2005 agreement or as part of the negotiations directed to obtaining agreement on the September 2005 agreement,

the applicable terms and conditions of employment for Mr Nelson are those contained in the June 2003 agreement.

What are the relevant provisions of the June 2003 agreement?

[19] The first matter I draw attention to in relation to the June 2003 agreement is the description of the employee's position as that of project manager. Clearly that was the position which Mr Nelson occupied at the point at which the June 2003 agreement came into effect viz. 1 May 2003. Subsequently, and I accept that this was somewhere around September/October or November of 2003, Mr Nelson became the farm manager. There were discussions between the parties after that event occurred, with a view to entering into a fresh employment agreement, presumably amongst other things to reflect the new duties that Mr Nelson had taken on, but for various reasons which need not concern us here, it seems that the parties did not agree on the terms of the new employment agreement.

[20] The June 2003 agreement provides for a probationary period of employment down to 31 December 2003 and then subject to a review which may be requested by either party, the existing agreement can simply *roll over without any change*. To emphasise its continuity, there is a further and subsequent provision giving power to formally renew the agreement by *mutual agreement*.

[21] The agreement provides for a salary of \$40,000pa and there are important provisions relating to annual leave. The agreement provides for 15 working days annual leave per annum and the parties agree that that equates to three weeks.

[22] Clause 20.3 of the June 2003 agreement is highly relevant and I set it out now in full:

20.3 Annual leave should be taken in the year in which it falls due. If the employee cannot agree on when annual leave may be taken the employer may specify the leave period and if the employee still does not take the leave it will be forfeited.

[23] This provision purports to limit the taking of annual leave and I need to give particular consideration to it. I do that in the next section of this determination.

[24] Clause 20.4 of the June 2003 agreement is also highly relevant. I set it out in full as well:

20.4 The employee is responsible for notifying the employer when he/she is taking annual leave and the arrangements he has made to fulfil his responsibilities while off on leave.

[25] Again this is a provision which purports to limit the ability of the employee to take leave. I need to consider this provision as well and I turn to that shortly.

[26] Presumably to be read in conjunction with Clause 20.4 of the June 2003 agreement is a further provision found at Clause 21.4 entitled *Responsibilities regarding leave*. I set out the terms of this provision in full as well:

21.4 Whilst on holiday or leave the employee must realise that he/she is still responsible for the farm's activities and the welfare of all livestock. Suitable arrangements therefore must be made prior to leaving. The employer shall be notified of these arrangements and of any leave details prior to any leave being taken pursuant to this agreement.

[27] The effect of this provision is to reinforce the effect of Clause 20.4 and I consider this provision in the same section that I will be looking at Clause 20.4

Is the limitation on leave reasonable?

[28] Clause 20.3 of the June 2003 agreement requires first that annual leave must be taken in the year in which it falls due. That is a common enough provision in employment agreements. However, the clause goes on to provide that if the employee cannot agree on when leave should be taken the employer may specify the leave period and if the employee still does not take the leave then it will be forfeited. In my opinion, that second sentence of Clause 20.3 is void and severable as being in breach of the Holidays Act 1981 which was operational at the time.

[29] The policy considerations underpinning successive holidays legislation include the fundamental premise that workers should be provided with a guaranteed right to take annual leave on pay. Further, s12 (1A) of the 1981 Act requires an employer to allow a worker to take holiday leave that the worker is entitled to. If, as in this case, despite the operation of the relevant clause, the leave in question is not taken, then the clause requires that it be forfeited. In my opinion, annual leave is a statutory entitlement and this contractual provision purports to limit that entitlement: *S 12 (1A) and 33 Holidays Act 1981* applied.

[30] Further, there is no evidence whatever before the Authority that the process contemplated by s.20.3 was ever actually applied. That process required the employer to specify the leave period if the employee could not agree on annual leave. There was no evidence before me that the employer ever sought to direct the employee to take leave. On that basis then, there can be no reliance placed by Hickory Bay on the forfeiture provision because the conditions precedent to the forfeiture have not been met.

[31] It follows that I find that Clause 20.3 cannot stand in its present form and as to the second sentence of the clause, ought to be severed from the agreement as being in breach of the Holidays Act 1981. However, even aside from that fundamental argument about the provision being *ultra vires* the Act, there is no evidence to suggest that the conditions precedent to the forfeiture had ever been met and accordingly the reliance placed on the forfeiture provision by Hickory is misconceived.

Alternative arrangements while on leave

[32] Clause 20.4 and 21.4 of the June 2003 agreement both cast an onus on the employee to make *suitable arrangements* before taking annual leave. Clause 21.4 goes so far as to say that whilst on annual leave the employee *must realise that he/she is still responsible for the farm's activities and the welfare of all livestock*.

[33] Again, I am satisfied that the provisions just referred to both unreasonably limit the ability of a worker to take an annual holiday on pay. If a worker remains responsible for his employment while he is on holiday, then it is difficult to see how such an arrangement can be the sort of annual holiday that the policy of the Holidays Act requires.

[34] I accept the evidence of Mr Nelson that as a matter of practical reality, it was very difficult for him to fulfil the obligations that these clauses purported to put on him in terms of taking annual leave and it is unfair of the employer, having sought to make this stipulation to now seek to rely upon it for the purposes of avoiding paying Mr Nelson annual holiday pay which, were it not for the restricted nature of the provisions just examined, would have been able to be readily taken during the course of the employment.

[35] Hickory Bay asserted in their evidence that Mr Nelson never notified it of his desire to take annual leave and they relied on that fact to support their position. I accept the veracity of that evidence but do not think that it takes us very far. Mr Nelson said that he felt unable to apply for leave because of the strictures in the employment agreement that I have just referred to.

The September 2005 agreement

[36] Mr Reeves for Hickory Bay Limited called at the farm property and met with Mr Nelson on 15 September 2005. He handed Mr Nelson a copy of a proposed new employment agreement. This September 2005 agreement is cast in very similar terms to the June 2003 agreement and indeed appears to have been drafted to ensure that there could be no issue about continuity of employment.

[37] I make that observation because of the effect of the provision as to term which is in the following terms:

3. TERM

The terms and conditions of this agreement shall be deemed to have come into force from the first day of May 2003 and will continue in force and will be rolled over without any change thereto thereby being able to be implied such roll over to be continued indefinitely unless a review shall have been sought by written request by either party to the other and the agreement either amended by agreement of the parties or cancelled.

[38] Mr Nelson relies on that very provision to justify a claim of backdating both salary and additional annual leave entitlement to 1 May 2003. The September 2005 agreement provides for a substantial salary increase for Mr Nelson to \$55,000 pa and also grants him four weeks leave instead of the three weeks provided in the June 2003 agreement.

[39] Mr Nelson was in fact paid \$55,000 on and from 1 January 2004 and now seeks to have that additional emolument back dated to 1 May 2003 as a consequence of Clause 3 of the September 2005 agreement.

[40] I think this claim of Mr Nelson's is completely unsustainable. The operative employment agreement I hold is the June 2003 agreement. No other agreement was ever completed by the parties. If Mr Nelson had wanted to rely on and obtain the benefit of the September 2005 agreement he should have signed the document.

[41] I think Mr Nelson's reliance on the "Term" provision in the September 2005 agreement is misconceived. Given that the agreement has not been executed by the parties and does not, I find, form the basis for their understanding, it cannot be relied upon. The decision of the employer to apply the new salary with effect from 1 January 2004 bears no relationship at all to the September 2005 agreement and is simply an arbitrary date which the employer presumably chose in the interests of administrative convenience. Nothing in the September 2005 agreement could have entitled Mr Nelson to believe that he ought to be paid the new salary with effect from 1 January 2004 and yet that is what happened, so I am not satisfied that either party acted to implement the new agreement in any reasonable sense.

[42] Further, I am absolutely satisfied that it would not be Hickory Bay's intention in providing this draft agreement, for the clause on the term of the agreement to be construed so as to entitle Mr Nelson to either salary or annual leave entitlements back to 1 May 2003. Had that been Hickory's intention, then presumably they would have paid salary back to that date rather than to 1 January 2004 which is what they did.

Determination

[43] I am satisfied that Mr Nelson has made out his claim for holiday pay for the period of his employment at the rate specified in his operative June 2003 agreement. I accept the evidence that, on a perusal of Mr Nelson's diaries for the relevant period it would seem that he took 18 days annual leave over the period of his employment and his entitlement over that period was 42.5 days meaning that he is owed 24.5 day holiday pay. I accept the calculation done by

counsel for Mr Nelson that the total amount owed to him in that regard is a gross sum of \$5,419.00 and I direct that Hickory Bay Limited is to pay Mr Nelson that sum.

[44] Mr Nelson also seeks interest on the outstanding amount. I am entitled to award interest pursuant to Clause 11 of Schedule 2 of the Act and I now do so at the rate of 7% per annum on the unpaid sum from the date of the termination of Mr Nelson's employment down to the date of payment of the arrears of holiday pay.

[45] Mr Nelson also seeks a penalty against Hickory Bay Limited. I accept that Mr Nelson has encountered difficulty in obtaining money that is rightfully his but I do not accept that Hickory Bay's delay is occasioned by impropriety. I think that Mr Nelson is adequately compensated by the payment of interest on the outstanding amount.

[46] Mr Nelson's claim for wage arrears fails for the reasons that I enunciate above.

Costs

[47] Costs are reserved.

James Crichton
Member of Employment Relations Authority