

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 160
3018113

BETWEEN ALLEN OWERS
Applicant

A N D ALLIED SECURITY LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Heather Woolstencroft, representative for Applicant
No appearance for Respondent

Investigation Meeting: 22 September 2020

Submissions and further information received: Up until 21 January 2021 for the Applicant

Date of Determination: 21 April 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Allen Owers worked for Allied Security Limited as a security guard from 13 June 2016.

[2] Mr Owers' employment agreement recorded that he was employed as a casual employee. Mr Owers says despite this he worked regular hours and was actually a permanent part-time employee. As a result, he says he was not paid the correct amount of holiday pay nor was he paid correctly for public holidays that he worked by receiving an alternative day holiday.

[3] Mr Owers also complains about how he was treated by Allied Security in relation to ongoing work after an incident in October 2016 when he asked for time off in relation to work he had been offered and had agreed to work.

[4] Allied Security says it has reviewed Mr Owers' holiday entitlements and is satisfied that he was a casual employee and he was paid correctly for all holiday including any entitlements that he may have had for working on public holidays.

[5] Allied Security says a personal grievance was not raised by Mr Owers, in relation to events in October 2016, within 90 days of the events complained of and therefore the Authority cannot investigate and determine that part of Mr Owers' claim.

[6] As Mr Owers was not able to resolve this dispute with Allied Security he lodged a statement of problem in the Authority based on these two issues.

[7] This is the employment relationship problem I have investigated and this determination resolves it.

Preliminary matter

[8] Allied Security lodged a statement in reply to Mr Owers' statement of problem. In that statement it denied any fault in terms of Mr Owers' holiday entitlement and stated he had been paid correctly. It also said a personal grievance had not been raised about any other aspects of Mr Owers' employment and there was no claim to answer.

[9] In order to progress this matter a case management conference was scheduled. Allied Security declined to participate in that call.

[10] In the case management conference I set this matter down for an investigation meeting. Following that call Allied Security was advised of the date, time and venue for the investigation meeting in a notice of investigation meeting.

[11] The notice of investigation meeting advised that *“If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.”* So, Allied Security was aware that I would proceed if it did not attend the investigation meeting.

[12] Considering all of the above, there was no apparent reason why the investigation meeting could not continue in Allied Security’s absence. I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

Holiday pay claim

[13] Mr Owers’ employment agreement with Allied Security recorded:

- (a) That Mr Owers was employed on a casual basis. That he would work “as and when available as agreed each week between employer and employee” and that there was no fixed or guaranteed hours on any day.
- (b) Mr Owers’ wage rate and advised that holiday pay was rolled up into this rate at 8%.
- (c) That any work done on a public holiday would be paid at one and a half times the hourly rate.

[14] Mr Owers explained that he worked for Allied Security covering 12 hour shifts where there were not enough permanent employees to cover the roster, for example if employees

were on holiday or a particular site was short staffed. He was offered shifts on a monthly basis with additional shifts offered as they arose. He acknowledged he did not have to accept all shifts offered to him but he said in fact he accepted and worked all of the shifts offered.

[15] As a result of the way in which Mr Owers was deployed to cover absences and because he accepted all of the shifts offered to him, Mr Owers often worked four days in a row. And Mr Owers says his work fell into a regular pattern of four days on then four days off with the rostered days on being two day shifts and then two night shifts. It is based on this that Mr Owers says he was actually a permanent employee.

[16] Whilst I understand that from Mr Owers' perspective the continual work appeared to fall into a pattern and felt like permanent work, the reality of what he did was not that as the time records produced by Mr Owers does not reflect a complete pattern of four days on then four days off. There are two parts to this:

- (a) The total number of hours recorded by Mr Owers do not match a consistent pattern of four days on then four days off. In many weeks, the total hours worked are not a multiple of twelve. And in other parts consecutive weeks do not match the pattern.
- (b) The one roster produced in the investigation meeting shows one week in which Mr Owers worked one day on, one day off then three days on. It also has a period of four days on then fourteen days off, followed by only one day on.

[17] Further, Mr Owers evidence reflects that the work offered to him was in line with the terms of his employment agreement and consistent with it being casual employment

- (a) Mr Owers spoke of his work being to cover other employees. The roster produced reflected this as Mr Owers name was not listed with the four permanent employees who were rostered on but rather his name was hand-written into shifts for the employee he was covering.

(b) Mr Owers was not obliged to accept work and he knew he was not guaranteed regular shifts.

(c) Mr Owers worked at different sites and did work in different shift patterns.

[18] Based on my analysis, I conclude that Mr Owers was a casual employee. And as a result I find that he was not entitled to any additional payments in terms of holiday pay, in particular any entitlements for additional pay for working on public holidays.

Personal grievance

[19] In October 2016 Mr Owers had been offered and had accepted work which included one twelve hour shift on 1 October, which Mr Owers says was part of a four day shift pattern he had accepted. Mr Owers subsequently decided he could not work on 1 October and asked for the day off. His supervisor was not happy with this but agreed to give him that time off but he also told Mr Owers not to come in for the balance of the four day shift he was covering.

[20] Mr Owers' evidence was not clear on what the balance of the shift was – he described it as being told not to come in on the Saturday and Sunday and also described it as having three shifts removed from him.

[21] Mr Owers felt aggrieved by this at the time and raised it with Allied Security in terms of losing rostered work and claiming that he was owed three days' work. There are emails in November 2016 that set this out and one refers to this as a personal grievance.

[22] Mr Owers says he was unable to resolve the personal grievance at the time and Allied Security's response was to stop offering him work. However Mr Owers' time records show he did work additional hours in October 2016 and his own evidence is that after the October 2016 "time off" disagreement he suffered an injury at work and he was on ACC for some time whilst he had an operation and received treatment for the injury.

[23] Mr Owers' statement of problem describes his personal grievance as being disadvantaged by not being offered further work by Allied Security after the October "time off" incident.

[24] So, the personal grievance claim in the statement of problem is not a claim for the removal of shifts by Allied Security; Mr Owers raised that at the time but did not pursue that through his claim with the Authority. The personal grievance is about not being offered further shifts after October 2016.

[25] Allied Security has objected to this personal grievance being heard by me as it says a grievance was not raised on these grounds by Mr Owers within 90 days of the events giving rise to it.¹

[26] I accept Allied Security's position – there is no evidence that a personal grievance relating to Mr Owers not being offered further shifts was raised by Mr Owers before the statement of problem was lodged in August 2018, which is in excess of any 90 day period.

[27] In terms of the personal grievance that was raised, that was pursued by Mr Owers in the investigation meeting but it had not been commenced in the Authority before this. The investigation meeting was held on 22 September 2020, which is over three years since the grievance was raised and this means I do not have jurisdiction to investigate it.²

Orders

[28] Mr Owers was a casual employee. Allied Security has paid Mr Owers his correct holiday pay entitlements including any entitlements in respect of work he undertook on public holidays.

¹ Section 114 of the Employment Relations Act 2000.

² Section 114(6) of the Employment Relations Act 2000.

[29] I do not have jurisdiction to investigate and determine Mr Owers' personal grievances as one grievance was not raised within 90 days of the events giving rise to the grievance and the other was not commenced in the Authority within 3 years of the grievance being raised.

[30] Mr Owers' claims are dismissed.

Costs

[31] There is no order for costs.

Peter van Keulen
Member of the Employment Relations Authority