

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 270/08
5120180

BETWEEN JOURDAN PIACUN
 Applicant

AND THE SPA AND POOL
 FACTORY LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: M Ryan, counsel for Applicant
 N Percy, counsel for Respondent

Investigation Meeting: 26 June 2008

Determination: 1 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jourdan Piacun and her former employer, the Spa and Pool Factory Limited (“SPFL”), are parties to agreed terms of a settlement reached under s 149 of the Employment Relations Act 2000.

[2] It was a term of the settlement that:

“3. The respondent will pay the Applicant within 7 days of the date hereof any outstanding holiday pay or wages.”

[3] Ms Piacun says she has not been paid the holiday pay owed to her, and seeks an order for compliance with the terms of settlement in that respect.

[4] SPFL refused to pay three weeks’ holiday pay which, on its records, appeared to be an outstanding entitlement. It says Ms Piacun should have recorded the time in question as paid annual leave, but failed to do so. The time covered:

(a) a two-week trip to the USA in 2006; and

(b) a one-week trip to New Caledonia in 2006.

[5] The parties were directed to mediation in a direction of the Authority dated 17 April 2008. SPFL's sole director, Michael McGurk, informed the mediation service that he was not interested in attending. When the matter was referred back to the Authority, the company's accountant informed the Authority that Mr McGurk would not be attending an investigation meeting. Mr McGurk confirmed his position in a letter dated 19 May 2008, saying he was 'not interested' in attending the meeting.

[6] Despite this Mr McGurk did attend the scheduled meeting. At the time neither party had a representative.

The entitlement to holiday pay

1. The trip to the USA

[7] Ms Piacun's trip to the USA was for the purpose of attending a gaming expo in Las Vegas. Mr McGurk also attended the conference, and the two were travelling together until there was an unfortunate incident between them.

[8] Ms Piacun says the trip was work-related. She says this because Mr McGurk has interests in certain Auckland bars which have gaming machines. She did some work for those businesses. No-one has taken issue with whether SPFL is liable for payment on the basis of those circumstances.

[9] However the trip was not two weeks long, and the expo was only a few days long. The company was not entitled to treat the full two weeks as paid annual leave. Ms Piacun was not entitled to treat the full two weeks as time worked. Moreover it was alleged in a document provided by the company that although Ms Piacun travelled to Las Vegas she was not registered for the expo as an attendee, and she did not attend. Ms Piacun said she did attend.

[10] It was obvious that a very different problem underlies this claim. However, making the best of the unsatisfactory evidence from both parties, I advised that I would take into account as work time Ms Piacun's travel time and time arguably spent

attending the expo. I assessed the work time for which annual leave should not have been deducted as 5 days.

2. The trip to New Caledonia

[11] Ms Piacun told me the trip to New Caledonia was a private holiday she took with her 'boyfriend'. However she said she spent her time on work-related matters, so sought the reinstatement of her entitlement to paid annual leave.

[12] Ms Piacun's evidence in that respect was not as frank as it should have been. Moreover when I asked her to be more specific about the work she did while on holiday, she said she had worked on the plane and had made work-related telephone calls on the day she arrived in New Caledonia. When I asked her to be more specific about how much of her time was spent on these calls, she estimated she had spent 2 – 3 hours on them.

[13] Ms Piacun was on firmer ground when she said that, on the last day of her holiday, she returned to New Zealand at about 3 pm and worked until 10 pm. She did a full day's work and that day should not be treated as annual leave.

[14] Two of the days spent in New Caledonia fell on a weekend. They should not have been treated as annual leave in any event.

[15] I indicated to the parties that I would assess at 3.5 days time which should not have been treated as paid annual leave. Accordingly Ms Piacun was entitled to payment for a further 3.5 days' annual leave.

3. Subsequent referral to mediation

[16] The state of the evidence was so unsatisfactory that I gave SPFL an opportunity to refer to its records to obtain further information about the matters

discussed before the orders were confirmed. Its response was not limited to matters arising out of the claim for holiday pay for the three weeks in question. Its letter dated 27 June 2008 raised further allegations that Ms Piacun had taken another paid holiday she had not recorded, and that certain wage payments had been overpaid.

[17] Since I had difficulties with the credibility of both parties, and there were wider issues between them, instead of issuing the determination I directed them back to mediation. Mediation was scheduled, but there was no attendance on behalf of the company. I am told that was as a result of a misunderstanding about the availability of Mr Ryan, who had by then been instructed.

[18] Even if I accept the misunderstanding was genuine, in all of the circumstances I am not prepared to delay the resolution of this matter any further.

4. Order of the Authority

[19] SPFL is ordered to comply with the cited provision in the settlement agreement by paying to Ms Piacun the equivalent of 8.5 days' pay as outstanding holiday pay.

[20] Section 137(3) of the Employment Relations Act 2000 obliges me to specify a time within which the order is to be obeyed. I therefore order that payment be made within 7 days of the date of this determination.

Costs

[21] Costs are reserved. If either party wishes to address me on costs they are to do so by the filing and service of memoranda within 28 days of the date of this determination. Any party against whom an award of costs is sought shall have a further 7 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority