

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 75
3018539

BETWEEN PETER READER
 Applicant

A N D GRAYS TRANSPORT NZ
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: M Revell , Counsel for the Applicant
 C Davis, Director for the Respondent

Hearing date: 1 March 2018 at Auckland

Submissions Received: 1 March 2018 from both parties

Date of Oral Determination: 1 March 2018

Date of Written Determination: 2 March 2018

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Peter Reader resigned from his employment but alleges he was constructively and unjustifiably dismissed. He further alleges he is owed wage arrears and seeks penalties for non-compliant wage and leave records and breaches of good faith for failing to supply the records when requested.

Relevant Facts

[2] Mr Reader was employed as a truck driver on 23 May 2015.

[3] He was originally employed to do “floating runs” that enabled him to choose which days they are at home and which days they are driving.

[4] He was originally employed at a rate of \$20 per hour plus paid an overnight non-taxable allowance for 8 overnights at \$35 of \$280. In September 2015 this changed to a salary of \$2,520 overnight non-taxable allowance for 8 overnights at \$35 of \$280 until January 2017. On 8 January 2017 his wage slips show his salary was reduced to \$1600 with an increased overnight non-taxable allowance of \$1,200 that resulted in an increased take home net pay.

[5] In June 2016 Mr Reader took one day's leave to visit a doctor. By 8 August 2016 Mr Reader had been diagnosed with multiple myeloma or bone cancer. This required he attend appointments on Friday's for treatment.

[6] From 7 to 18 November 2016 he took two weeks leave to undergo stem cell surgery to treat his cancer and recover. He then returned to work for two weeks.

[7] During this time he requested and was granted the ability to cash in one week's annual leave to meet household bills.

[8] He then took one month's annual leave to recover from his surgery from 2 December 2016 until 9 January 2017. His medical certificates noted he had Friday appointments at Palmerston North hospital.

[9] In late 2016 the respondent's main client changed the floating runs to fixed runs from Auckland to Wellington. The fixed runs prevented Mr Reader from attending Friday treatment appointments at Palmerston North. He made alternative arrangements for treatment days but was eventually told he was required to attend on Fridays.

[10] Mr Reader spoke to Steven Stanmore about his treatment situation in 2016. Mr Stanmore told him the respondent had no choice but would do what they could for him. It is accepted Mr Reader's truck was the only one equipped to do the fixed runs and there were no more floating runs offered by the client.

[11] Mr Reader undertook fixed runs in 2017 finishing in Wellington. The respondent provided a car so he could drive from Wellington to Palmerston North for treatment on Fridays. However the main client was unhappy with this situation so this option could not continue.

[12] Mr Reader resigned in March 2017. On 2 June 2017 Mr Reader raised a personal grievance through his then representative.

Fast track Hearing

[13] Both parties confirmed this was suitable for the fast track system. The fast track system does not require the parties to file briefs. It is assumed all relevant information is contained in the statements of problem and reply or any additional information shall be filed as directed.

[14] Prior to hearing the Authority was advised the respondent's representative was no longer involved. The day prior to the hearing the respondent director, Chris Davis sought an adjournment because he had not provided all of the material he wished to.

[15] A telephone conference was held. The adjournment was declined because the respondent confirmed through Mr Davis that it was aware this matter had been set down and the timetabling directions for filing the evidence had been made. Mr Reader had also taken time off work and the Authority had arranged for his evidence to be given by AVL from Wellington. Mr Davis was invited to attend by telephone which occurred.

Issues

[16] The issues for hearing were:

- (a) Whether there are wage arrears owed for:
 - (i) Sick leave entitlements where annual leave was used instead;
 - (ii) Annual leave entitlements that were taken as sick leave or not accrued properly;
 - (iii) Public holiday entitlements that were not paid or were worked and not paid properly or that should have been accrued; and
 - (iv) Payment for the last week of work from 20 – 29 March 2017.
- (b) Whether a penalty should issue for the following breaches:
 - (i) Inaccurate holiday leave records pursuant to s.81 of the Holidays Act 2003;

- (ii) Inaccurate wage and time records pursuant to s.135 of the Employment Relations Act 2000 (the Act);
 - (iii) Breaches of good faith by the employer's repeated failure to supply copies of the above records in response to requests to do so;
 - (iv) Breaches of good faith by the employer's actions in respect to requests for flexible working arrangements.
- (c) Whether the applicant was constructively and unjustifiably dismissed and/or disadvantaged by the employer's refusal of flexible working arrangements resulting in him having to find alternative employment.
- (d) Whether the respondent has a counterclaim for lost revenue due to part of an unworked four week notice period by the applicant.

Wage arrears

[17] I directed the employer to provide the wage, time and leave records for Mr Reader by **7 February 2018, 3pm**. Only copies of the logbooks have been received.

[18] Mr Reader has produced copies of his pay slips to 19 March 2017 and a table headed "annual leave". This is the extent of the respondent's wage, time and leave records.

[19] Section 81 Holidays Act 2003 (HA) requires employers keep a holiday and leave record that contains the following information:

- (2) An employer must at all times keep a holiday and leave record showing, in the case of each employee employed by the employer, the following information:
- (a) the name of the employee;
 - (b) the date on which the employee's employment commenced;
 - (c) the number of hours worked each day in a pay period and the pay for those hours;
 - (d) the employee's current entitlement to annual holidays;
 - (e) the date on which the employee last became entitled to annual holidays;
 - (f) the employee's current entitlement to sick leave;
 - (g) the dates on which any annual holiday, sick leave, or bereavement leave has been taken;
 - (h) the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken;
 - (ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable);
 - (hb) the date and amount of payment, in each entitlement year, for any annual holidays paid out under section 28B (if applicable);

- (i) the dates of, and payments for, any public holiday on which the employee worked:
- (j) the number of hours that the employee worked on any public holiday:
- (ja) the day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44A or 44B and the calendar day or period of 24 hours to which it has been transferred (if applicable):
- (k) the date on which the employee became entitled to any alternative holiday:
- (l) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:
- (m) the cash value of any board or lodgings, as agreed or determined under section 10:
- (n) the details of any payment to which the employee is entitled under section 61(3) (which relates to payment in exchange for an alternative holiday):
- (o) the date of the termination of the employee's employment (if applicable):
- (p) the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):
- (q) any other particulars that may be prescribed.

[20] The annual leave record fails to record any of the matters set out in s81(d) to (l) and (o) and (p) of the HA. Pursuant to s83 of the HA I am satisfied there has been a failure to comply with s81 of the Holidays Act 2003. This failure has prevented Mr Reader from bringing an accurate claim. I may therefore accept as proven, in absence of evidence to the contrary statements made by Mr Reader about his holiday pay or leave pay paid and annual and public holidays or sick leave actually taken by him.

Sick Leave

[21] There is little doubt Mr Reader was unwell in November and December 2017. His medical certificates show this. Mr Reader states the employer was also aware of his ill health. His leave record does not show any sick leave taken. In November 2016 Mr Reader should have received 10 days sick leave.

[22] The two weeks he was ill from 7 to 18 November 2016 have been recorded as annual leave. This should have been sick leave. The employer was on notice he was unwell and should have paid this out as sick leave. Accordingly Mr Reader is entitled to recover 10 days annual leave.

Annual leave

[23] Mr Reader's annual leave balance is not recorded in the annual leave record produced. It also does not record the public holidays between the Christmas and New Year period. It records the period of 27 to 31 December 2016 then later records the

same period again as annual leave taken between 2 December 2016 and 6 January 2017. It also records 5 days annual leave paid out but not the amount.

[24] Mr Reader accepts he was paid one week's annual leave or 5 days. He also accepts he was not at work from 2 December 2016 and returned to work on 9 January 2017. There are 4 statutory holidays during this 4 week period meaning he took three weeks or 21 days annual leave. Therefore he has taken or been paid out four weeks annual leave in total.

[25] At the time he resigned he was entitled to 4 weeks annual leave and 8% of his gross wages earned since his annual leave anniversary had passed. Therefore he is owed annual leave of 8% of his gross pay for the period 23 May 2016 until termination. Given there are the below issues about the salary he received in his final three months of work, I cannot determine the final figure for annual leave at this stage.

Public holiday entitlements

[26] The annual leave record does not record any information relating to the public holidays worked or not.

[27] Although Mr Davis alleged Mr Reader only worked 3 public holidays, I prefer Mr Reader's evidence that he in fact worked 9 Public Holidays. Mr Reader's representative produced a summary of the public holidays worked cross referenced to the logbook and payslips. She submits there is evidence from the logbook (produced by the respondent) that his truck was not at his home base. Further she also identified where his payslips recorded payment of time and a half and accepted there was no claim.

[28] The summary showed he worked and is owed time and a half and a day in lieu for 7 public holidays. He is only owed a day in lieu for 2 public holidays.

[29] Given there is no breakdown of hours worked each day, I have divided 126 hours by 10 days worked each fortnight. This leaves an average of 12.6 hours worked per day. He is entitled to receive an additional 6.3 hours payment for wage arrears.

[30] His daily rate at the time of dismissal must be calculated on the greater of his ordinary weekly pay at the end of employment or his average earnings for the 12

months before the last pay period.¹ Given there are now the below issues about the salary paid in the final three months, the final calculation cannot be given.

Payment for the last week of work

[31] The payslips finish at 19 March 2017. Mr Reader alleges he was not paid his wages beyond that period. The law requires written consent to deduct or withhold wages in this manner.² If he has worked up and until 28 March 2017 he is entitled to receive wages for it unless there is agreement in writing for deductions. There is no agreement for deductions in writing. There is also no clause in the employment agreement allowing deductions to occur in this matter.

[32] Given the absence of any wage and time record, I have to rely upon the log books produced by Mr Reader and the respondent. These show Mr Reader was working up and until 28 March 2017. Therefore he is entitled to receive payment of his salary from 19 to 28 March 2017. Given there are now the below issues about the salary paid in the final three months, the final calculation cannot be given.

Unjustified Dismissal

[33] Mr Reader alleges there was breach of duty by the respondent that it should have foreseen would have resulted in his resignation. He states he was given no choice but to resign because the respondent did not consider or do enough to provide him with flexible working conditions that allowed him to attend cancer treatments.

[34] Mr Davis gave evidence that the respondent had little choice in the types of trucking runs it worked. These were allocated by its client. They had been allocated fixed runs only. The client had allowed continuation of a floating run when Mr Reader first became unwell but required fixed runs when he returned. The truck and trailer Mr Reader operated was also more suited to the fixed runs than the floating runs he had previously undertaken. The respondent had provided a vehicle for Mr Reader to travel to Palmerston North from Wellington for treatments on Fridays at the end of his run. However the client was unhappy with this arrangement and it ended. Mr Reader confirmed he was aware of this information before dismissal.

¹ Section 24 Holidays Act 2003.

² Section 5 Wages Protection Act 1983.

[35] In circumstances there has not been any breach of duty by the respondent. It has done as much as it was able to accommodate Mr Reader's treatments. In the circumstances Mr Reader was not constructively dismissed but resigned. The unjustified dismissal claim is dismissed.

Counterclaim

[36] The respondent alleges it is entitled to recover the lost time for a four week notice period that Mr Reader did not work. The employment agreement states the notice period was "Two weeks" for Mr Reader as at the date he signed it. This is because he was a waged employee at the start of his employment.

[37] There is evidence Mr Reader worked two weeks from the date he told the respondent he was leaving. Steven Stanmore, Mr Reader's manager states he was told before the 20th that Mr Reader wanted to resign although he could not give a specific date. Mr Reader states he told him on the 14th he wanted to resign. He accepts he mistakenly dated his resignation letter 12 March when it should have been 14 March.

[38] The respondent alleged notice to terminate the employment had to be in writing. That is incorrect. The employment agreement does not specify Mr Reader has to give notice to terminate his employment in writing. Therefore the oral termination given to Mr Stanmore is sufficient.

[39] I accept Mr Reader's evidence the oral notice to terminate was given on 14 March. Therefore he had by 28 March worked his notice period of two weeks.

[40] Even if there were issues about the notice period worked, the respondent has not provided any evidence to support the counterclaim of lost revenue. It also did not require Mr Reader to return to work to complete any notice period and mitigate its losses. In the circumstances I dismiss the counterclaim for "lost revenue" during the notice period.

Minimum wage

[41] From his payslips it is clear from 25 December 2016 onwards Mr Reader was working 126 hours per week and received \$1,600 every fortnight. Therefore he would have been working for \$12.69 per hour. In January 2017 the minimum wage was \$15.25 per hour. The Minimum Wage Act 1983 states that a worker "shall be entitled

to receive from his employer payment for his work at not less than that minimum rate.”

[42] For the hours he worked, Mr Reader should have been receiving a minimum of \$1,921.50 per fortnight. He received \$1,600 salary per fortnight. His “non-taxable allowances” do not count as salary. He has been underpaid by \$321.50 per fortnight. He is therefore owed wages for the period 9 January to 28 March 2017 and an annual leave entitlement for the fortnight period prior to 8 January of \$321.50.

[43] The respondent now alleges the wage slips produced by DCM Limited do not correctly record the way the salary was paid from December 2016 onwards. At hearing Chris Davis, respondent director advised that the records were held by another trucking company DCM Limited owned by his mother in law. He had been unsuccessful in obtaining those records in time for hearing. He now wishes time to seek further records regarding the salary recorded as paid in the payslips.

[44] Given this issue was raised during the hearing I will allow the respondent a further opportunity to provide evidence about his payslips and the minimum wage issues only. The parties are to file any further evidence about this matter by **9 March 2018 3 pm.**

[45] If there is no further evidence about the payslips filed, I intend determining the amounts owed upon the papers thereafter. A further determination shall then be issued through the Registry.

T G Tetitaha
Member of the Employment Relations Authority