

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 25/09
5084039

BETWEEN ALAN REID LABOUR
 INSPECTOR
 Applicant

AND BARMUDA LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Janine Hopkins, Counsel for Applicant
 Cassandra Park, Advocate for Respondent

Investigation Meeting: 21 January 2009

Determination: 29 January 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant alleges that the respondent, Barmuda Limited, has failed to pay Mr Peter Moore, a former employee, annual holiday pay. The applicant seeks the sum of \$1,305.96 and interest on that amount from 26 April 2004 until the date of payment.

[2] Mr Moore was employed from March 2003 until April 2004. Mr Moore contacted a Labour Inspector, Mr Alan Reid, in April 2007. Mr Reid made contact with Ms Cassandra Hopkins and endeavoured to obtain records for the period in question.

[3] Unfortunately, in 2005 many of the respondent's business records were damaged in a flood. These included an individual employment agreement signed by the applicant. In April 2006 the hard drive on Ms Park's computer failed and the

information stored on the computer was lost. Some of the information had been transferred to another computer so fortunately not all the records were lost.

[4] Ms Park supplied what records she could to Mr Reid. These included a payroll summary for the year ending 31 March 2005, Mr Moore's IR330 dated 19 May 2003 (this has an "M" tax code), Mr Moore's acknowledgement of responsibility and employment application, his new employee details and employee events form. These are dated 19 May 2003.

[5] I accept that Ms Park has supplied all the documents she is able to access and that the loss of the other documents occurred through no fault of the respondent's.

[6] In addition to the documents supplied by Ms Park I have two payslips supplied by Mr Moore for the weeks ending 12 October 2003 and 11 April 2004. These do not show a separate payment for holiday pay but the respondent's payroll summary separately itemises wages and holiday pay. Mr Moore has supplied two letters from IRD stating that he received \$20,120.00 gross for the year ending 31 March 2004 and that for the period from 1 April 2003 to 30 April 2004 he received \$21,717.00 gross from Barmuda Ltd. A further letter from IRD shows his earnings for the financial year ending 31 March 2003 as being \$29,884.00 gross which included income received in March 2003 from Barmuda Ltd totalling \$49.99 gross. There is also a tax code declaration signed on 5 April 2003 with an "S" code.

[7] Ms Park obtained from IRD PAYE return dates and amounts. These show that the earnings for April 2003 averaged \$155 per week. This is not indicative of full time employment. Mr Moore earned \$622 in April 2003 and \$1,254 in May 2003

[8] Mr Moore says he initially worked part time for a short period and then commenced full time employment on 14 March 2003; and that the employment ceased on 26 April 2004, making a total period of employment of about thirteen months.

[9] The respondent says that Mr Moore did initially work on a casual basis but that his employment did not become permanent until 19 May 2003 when he started work in a duty manager position. Ms Park said Mr Moore worked only one shift in

March. I accept that this is borne out by the IRD records which show Mr Moore having been paid \$50. The secondary tax code indicates that Mr Moore was in secondary employment at Barmuda Ltd.

[10] The change in tax code in May 2003 and the change in the earnings as shown by the IRD PAYE return records supports the respondent's contention that Mr Moore did not become a full time employee until 19 May 2003.

[11] Ms Park says that the full time employment was on a fixed term basis as her father was intending to take over the work after he had completed some building jobs. Mr Moore does not recollect that the employment offered and accepted was fixed term.

[12] Ms Park says that the missing employment agreement contained a term that holiday pay would be included in Mr Moore's wages and that the agreement he signed was signed when he became a full time employee. Mr Moore believes the agreement he signed was for casual employment and that he did not sign an agreement upon taking up the full time work. Mr Moore was uncertain about the content of the employment agreement and, indeed, about whether there had been an employment agreement. The weight of the documentary evidence and Mr Moore's lack of clarity regarding aspects of his employment lead me to prefer Ms Park's recollections and version of events.

[13] Mr Moore said he finished work on 24 April but bar tabs indicate that Mr Moore finished work on 15 April. The payroll records for the year ending 31 March 2005 show a final pay for the week ending 18 April 2004.

[14] I find that:

- Mr Moore was employed on a casual basis in March;
- he became full time on 19 May 2003;
- he was on a fixed term agreement when he took up full time employment;
- he signed an employment agreement when he became full time;
- that employment agreement contained a term to the effect that holiday pay would be included in his wages;

- the employment terminated on 15 April, not 26 April.

[15] Mr Moore’s employment commenced when the 1981 Holidays Act was in force. On 1 April 2004 the 2003 Act came into force. The relevant section of the 2003 Act is s 28:

When annual holiday pay may be paid with employee's pay

(1)

Despite section 27, an employer may regularly pay annual holiday pay with the employee's pay if—

(a)

the employee—

(i)

is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work for less than 12 months; or

(ii)

works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with [4 weeks'] annual holidays under section 16; and

(b)

the employee agrees in his or her employment agreement; and

(c)

the annual holiday pay is paid as an identifiable component of the employee's pay; and

(d)

the annual holiday pay is paid at a rate not less than [8%] of the employee's gross earnings.

[16] The Court of Appeal endorsed “pay as you go” holiday pay arrangements in two cases: *Drake Personnel (NZ) Ltd v Taylor* [1996] 1 ERNZ 324 (CA); and *Gladstone Milk Bar Ltd v Henning* [1998] 1 ERNZ 296; [1998] 3 NZLR 183 (CA). *Drake* involved the employment of casual labour, also known as “temps”, whereas *Gladstone* involved permanent, part-time employees. The two cases established the

principle that there was no reason why an obligation to pay money at some time in the future could not be discharged by earlier payment: *Drake*, at p 330. Section 28 adopted the possibility and the principle of early payment but restricted and controlled the practice.

[17] Under the Holidays Act 1981 casual employees could be paid on a “pay as you go” basis; or, where the parties had turned their minds to it and agreed, holiday pay could be paid on a “pay as you go” basis.

[18] Mr Moore could therefore be paid on that basis both during the period he was employed as a casual and during most of the period he was employed full time. That period lasted until the coming into force of the 2003 Act on 1 April 2004.

[19] The criteria set out in s 28 Holidays Act 2003 permitted “pay as you go” pay in certain circumstances. Mr Moore was employed in a fixed term position for less than 12 months and therefore s 28 (1) (a) applied. There was an employment agreement which included provision for “pay as you go” holiday pay and it was paid at the appropriate rate: s 28 (1) (b) and (d) applied.

[20] The problematic area is s 28 (1) (c). The holiday pay element was identified on the payroll records but not on Mr Moore’s payslips. The provision for holiday pay to be paid as an identifiable component of the employee’s pay has to be for the benefit of the employee so that the employee is clear about the basis and the amounts of the payments. The wages and the holiday pay components should have been separated on the payslips.

[21] I do not accept the argument that it was unreasonable for the employer to have adjusted its pay system to accord with the new legislation.

[22] Because not all the statutory criteria have been met Mr Moore is entitled to be paid 6% holiday pay for the period 1 April 2004 to 15 April 2004.

[23] If there are any difficulties in the parties calculating this amount leave is reserved to return to the Authority.

[24] The respondent is to pay interest on the holiday pay at the rate of 5.7%, the interest to run from 15 April 2004 until the date when payment is made in full.

Costs

[25] If the parties are unable to resolve the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority